



EMPLOYMENT TRIBUNALS

Claimant: Mr I Wells

Respondent: The Governing Body of Great Yarmouth High School

HEARD AT: Bury St Edmunds

ON: 3rd - 6th January 2017
9 & 30 January & 13 February
2017 in chambers

BEFORE: Employment Judge Laidler

MEMBERS: Mr P North
Mrs L Gaywood

REPRESENTATION

For the Claimant: Ms S King, Counsel

For the Respondent: Mr. A Brett, Solicitor

JUDGMENT

1. **The Claimant was unfairly dismissed**
2. **The Respondent knew that the Claimant fell within the autistic spectrum from March 2014 and knew or ought to have known that this amounted to a disability and that the anxiety and depression suffered by the Claimant was associated with his Asperger's syndrome.**
3. **The Respondent treated the Claimant unfavourably because of something arising in consequence of his disability by dismissing him**
4. **The Respondent failed to make reasonable adjustments in the operation of its absence procedure and dismissal of the Claimant.**

REASONS

1. The ET1 in this case was received on 13 July 2015 and the Claimant brought claims of unfair dismissal and disability discrimination.
2. In its Response the Respondent denied the claims stating the Claimant had been dismissed on capability grounds in view of his ill health and ill health absences asserting he had had 209 working days off from 9 December 2013 to 8 March 2015.
3. There was a preliminary hearing before Employment Judge Castle on 10 December 2015 when the current representatives attended.
4. There was a preliminary hearing by telephone before Judge Postle on 31 March 2016 at which a list of issues was finalised.

The issues

5. By one claim form filed on 13th July 2015 with the appropriate ACAS Certificate the Claimant made claims for direct discrimination (Section 13), disability related discrimination (Section 15), indirect discrimination (Section 19) and failure to make reasonable adjustments (Sections 20 and 21). There is also a claim for ordinary unfair dismissal under the Employment Rights Act 1996.
6. The claims give rise to the following specific issues:

6.1 Direct Discrimination (Section 13)

The Claimant asserts that he was treated less favourably in relation to the decision of the then Head Teacher, Wendy Missons, to subject him to performance management during 2013-14 when his class was out-performing the Respondents' two other math's sets. The Claimant relies upon Jemima Parkhurst as a comparator.

6.2 Disability Related Discrimination (Section 15)

- 6.2.1 Was the permanent alteration of the Claimant's duties unfavourable treatment because of something arising in consequence of the Claimant's disability?
- 6.2.2 Was dismissal for sickness absence caused by depression and anxiety unfavourable treatment because of something arising in consequence of the Claimant's disability?

6.2.3 If so, did or should the Respondents have been aware of the Claimant's physical and mental impairment with a substantial long-term effect on his ability to carry out day to day activities.

6.2.4 The Claimant relies upon:

- (a) the knowledge of the Head of the Maths Department from 2007 onwards;
- (b) the Claimant's sick notes confirming "anxiety and depression" and "stress"; and
- (c) the Occupational Health reports confirming severe anxiety.

6.3 Indirect Discrimination (Section 19)

6.3.1 Did the Respondents apply a provision, criterion or practice (PCP) to the Claimant which placed or would place the Claimant with his disabilities at a particular disadvantage?

6.3.2 The Claimant relies upon two PCPs:

- (a) The Respondents' power to vary the duties of its teachers;
- (b) The Respondents' absence procedure.

6.3.3 Did the Respondents' PCPs place the Claimant at the same disadvantage?

6.3.4 The Claimant will assert the lack of flexibility and the need for certainty of Autistic Spectrum Disorder (ASD) sufferers meant that changes were likely to place those with Asperger's at a substantial disadvantage when their duties were altered relative to those who did not share their disability, and those suffering from anxiety and depression were more likely to trigger the absence procedure and risk of dismissal than those who did not share that disability.

6.4 Failure to Make Reasonable Adjustments (Sections 20 and 21)

6.4.1 If the tribunal finds the Respondents had applied PCPs, which placed the Claimant and those who shared his disabilities at a particular disadvantage, can the Respondents demonstrate that it took all reasonable steps to reduce that disadvantage?

6.4.2 Alternatively, have the Respondents proved that they could not have known of the Claimant's disabilities?

6.5 Unfair Dismissal

6.5.1 The Claimant accepts that there was a potentially fair reason to dismissal, namely capability.

6.5.2 The question arises, was the dismissal within the range of reasonable responses? In that respect the Claimant asserts:

- (a) dismissal was an act of discrimination for the above reasons;
- (b) the Respondents failed to consider alternatives to dismissal; and
- (c) the decision was pre-judged.

7. The only matter that was revised from that list of issues was the PCP relating to the Respondent's absence procedure. In the light of the decision in **Griffiths v Secretary of State for Work & Pensions 2016 IRLR 21**, the Claimant wished to amend the PCP to read: "The employee had to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanction".
8. At the outset of this hearing Mr Brett sought to argue that that amounted to an amendment for which leave needed to be obtained. On further consideration, however, he accepted that this was just further clarification and took no issue with the PCP being formulated in that way as indeed **Griffiths** had guided tribunals to do.
9. On 4 April 2016 after obtaining further evidence the Respondent made its position clear on disability which was that it accepted that the Claimant had been diagnosed with Asperger's Syndrome but it did not accept that the Claimant satisfied the statutory definition of disabled by virtue of anxiety and depression arguing that it disputed the effect was substantial within the meaning of the statutory definition. The other remaining issue however was the date of the Respondent's knowledge with regard to Asperger's Syndrome.
10. An earlier hearing listed for 19-23 September 2016 was postponed due to lack of judicial resources and this hearing was the re-listed hearing. Five days had been allocated to the hearing and it was agreed that in the first instance the tribunal would deal only with matters going to liability. No evidence was therefore heard in relation to matters going to remedy. The tribunal heard evidence over four days and on the fifth day met in chambers to conduct its deliberations agreeing that its decision would be reserved and sent to the parties in writing. In view of the number of issues it was necessary for the tribunal to meet on two further days to finalise its decision.

11. The tribunal heard from the Claimant and from Wendy Missons, former Head Teacher; Mr Ian Cooper, Human Resource Manager; and Katie Randell, Human Resources Adviser.
12. From the evidence heard the tribunal finds the following facts.

The facts

13. The Claimant commenced employment with the Respondent on 1 September 2016. The Claimant was promoted to Key Stage 4 Mathematics Leader of Learning effective 1 September 2010 and his salary increased to TLR2b because of that additional responsibility. The Claimant appears to have progressed very swiftly from unqualified teacher status that he had when first employed to a position of responsibility in 2010.
14. In a disability impact statement prepared and served for these proceedings the Claimant stated that in or about 2007 there were a series of child and family psychiatric appointments for his son following an incident in 2002. The family then received learnt that the son had significant difficulties that were indicative of Asperger's Syndrome. Further, the Claimant was advised that he was most certainly the same in having Asperger's Syndrome due to a genetic link. He states in that impact statement that he told his then head of department, who he explained to this tribunal was a Mr Lever, of the ongoing appointments and that he "showed a degree of interest in me and how the appointments were progressing". He states that at that time he obtained advice from the child and family practitioners that would help him understand Asperger's and he told his line manager about his medical condition and these appointments.
15. The tribunal accepts that there was nothing recorded in any school documentation to this effect. There is no independent evidence of any diagnosis at that stage. Indeed, Dr Ugochukwu confirms in his report of 29 February 2016 (obtained for these proceedings) that the formal diagnosis was made on the 23 February 2016. The tribunal finds that the Claimant may well have told his line manager of issues with his son and that the practitioners were looking into a genetic link with the son's parents, i.e. including the Claimant, but the tribunal has no evidence before it that the Claimant was actually diagnosed with Asperger's Syndrome at that point and that he told the school of that precise diagnosis. There was nothing in any of the documentation or medical reports that the tribunal had to confirm that.

The Claimant's time in ICT.

16. In December 2010 the head of Information Communication Technology (ICT) retired.
17. In January 2011 Ben Driver commenced as Maths Curriculum Leader.

18. In the summer of 2011 a second ICT teacher retired and a third teacher was on long term sickness absence. The ICT department was left with no teachers. When John Catton started in June 2011 as Consultant Head Teacher the responsibility for ICT was designated to Ben Driver who was then the Claimant's line manager. As the Claimant had a commercial background in ICT he offered to help Ben Driver with the ICT department.
19. The tribunal saw an email from Ben Driver to various people within the school dated 3 July 2011 which confirmed that the Claimant had offered to take on the ICT Co-ordinator role that had been advertised a few weeks ago on a temporary basis until Christmas. He was hoping to appoint a temporary Curriculum Key Stage 4 (KS4) Co-ordinator of Maths internally as soon as possible so that the Claimant could continue with ICT developments and they would be able to move forward in mathematics.
20. The tribunal also saw minutes of a mathematics meeting of 12 July 2011 at which there was a staffing update given which recorded that the Claimant was to combine with ICT and to "run on a temporary basis". In an email of 15 July 2011 Ben Driver again confirmed that the Claimant had begun his stint as co-ordinator of ICT. There is no doubt from this correspondence and minutes that the Claimant was in the role on a temporary basis and that was understood by all concerned.
21. In September 2012 Wendy Missons commenced her role as the Head Teacher.
22. In October 2012, the Claimant still working in ICT and applied for the post of Curriculum Lead but was unsuccessful.
23. By letter of 16 October 2012 Wendy Missons, the Head Teacher, wrote to the Claimant to confirm that his TLR payment would be temporarily increased from 2b to 1b during the period 11 October 2012 to 31 December 2012 in recognition of his responsibilities for ICT that term whilst they did not have a substantive curriculum leader in place. This would come through in the payroll in November.
24. There was a further letter dated 10 December 2012 from the Head Teacher to confirm the award of this allowance and this made it clear: "This is a temporary promotion only and you will revert to your substantive post without further notice on 1 January 2013". The head told this tribunal that it was clear from that letter that what she was referring to was the cessation of the temporary increase in pay reverting back to the Claimant's normal salary on 1 January 2013 and that this was not an indication in any way whatsoever that the Claimant would be reverting back to his substantive role in that by that date. The Claimant disputes that, stating that it had been made clear to him that he would return to his maths position in January 2013. The tribunal is satisfied that any reasonable reading of the letter of 10 December 2012 would lead the reader and indeed did lead the Claimant to believe he was returning to his substantive post on 1 January 2013 in all respects; ie he would be teaching maths again and at his normal pay grade.

25. The tribunal accepts that during this time in the ICT department there were significant challenges for the Claimant and Ben Driver, assisted only by supply teachers. The tribunal however, from the evidence heard, is satisfied that this is a level of stress that anyone would have experienced during those challenging times. The Claimant gave evidence about time off due to a severe sore throat but again there would not have been anything to alert Ben Driver to more significant stress.
26. The Claimant gave evidence at paragraph 52 of his witness statement that during the summer term 2012 he withdrew from communication with his family and spent a significant amount of the summer break doing absolutely nothing, with his wife holidaying away by herself. Although, as the Claimant says, Ben might have been aware of the stress the Claimant was under, the tribunal is satisfied that there was nothing at that stage to alert him to this being any more than the stress experienced by both himself and others with regard to that difficult department.
27. By email of 19 December 2012 the head's PA wrote to the Claimant inviting him to a meeting with the head and Ben Driver to discuss his TLR. This was arranged for 7 January 2013.
28. Shortly after her arrival an advertisement was placed for the head of ICT. The Claimant was not made aware of this as illustrated by his email to Ben Driver of 14 September 2012 but from his reply it can be seen that neither was Ben Driver.
29. The Claimant must, as already stated, have become aware as he applied for this role. The school's position was that even though a new head of ICT had been employed as he was new to the school, he needed time to settle in and the Claimant was still involved in ICT during that period and indeed assisting the new head of department with use of the system and other matters. The Claimant did not therefore return to teaching maths until September 2013.
30. The head gave evidence that when she arrived at the school in September 2012 in discussions with her senior management team and the deputy head performance concerns were raised about the Claimant. These had also been raised by his line manager, Ben Driver. The Head Teacher was aware that the Claimant was still in ICT at that time, so not teaching his key subject and was loath to start a capability process at that point. She therefore asked her deputy head to work with the Claimant to support him to try to improve his performance.
31. The tribunal saw a performance review conducted by Mr Driver on the Claimant dated 9 December 2011 for 2011/12. This provided three objectives:
 - 31.1 To raise Year 10 attainment
 - 31.2 To raise the school's ICT results;
 - 31.3 Improve the school's GCSE ICT provision.

32. In the comments section Ben Driver clearly records the difficulties that had been experienced in the department and that this had required considerable adaptation by the Claimant from his previous role. It also acknowledged the Claimant's substantial contribution to the life of the school outside of the classroom.

Performance Improvement Plan (PIP)

33. The first improvement plan the tribunal was taken to was that dated 21 March 2013. Three targets were identified:
- 33.1 To ensure the behaviour and safety of students in lessons is always satisfactory and usually good;
 - 33.2 Lessons are structured to ensure students are on task throughout the lesson;
 - 33.3 Students to make good progress during lessons.
34. It was clear from the support column of the table that the support was to be provided by Andy Smith and Ben Driver, Andy Smith being the new head of ICT. In the comments section it acknowledges that clarity was needed of the Claimant's role for the next year and that the next observation was due to be in mathematics. The progress against the criteria would be reviewed in the week beginning 20 May following two lesson observations by Ben Driver and the Head Teacher.
35. The email that sent this PIP to the Claimant is dated 15 April 2013 and the time for compliance was consequently extended.
36. The tribunal is satisfied that the criteria or, as they in fact were expectations, were reasonable to expect of a teacher whatever course was being taught. They were equally applicable to the Claimant's role in ICT as they were to maths.
37. In emails throughout April to June it can be seen there were lesson observations of the Claimant but also an opportunity given to him to observe Mr Smith in teaching.
38. There was an example in an email of 4 July 2013 when Ben Driver is seen as re-scheduling a lesson observation as the Claimant had had "a challenging group without you having necessary resources today" and this was about a projector issue. Then the observation was re-scheduled.
39. By email of 9 July 2013 Ben Driver forwarded to the Claimant his lesson observation feedback.
40. In the feedback which was dated: "Date of Observation 8 July 2013" in the evidence the Claimant has a number of areas where he is stated as "good" and "there are some good ideas" recorded. However, at the end the marks

given are “not adequate” or “requires improvement”. The areas for development were identified as planning, pace, length of time spent on activities and standards of behaviour. The agreed action was to request SJU (Sue Jury) to support with lesson planning by checking through the plan before the next observation. Indeed, in his email of 9 July Mr Driver said that even he himself did that on occasions.

41. By email of 11 July Andy Smith sent a note of the recent lesson observation. This noted that “overall most students have shown an interest in the subject but the behaviour of the class as a whole is hindering progress to a high degree”.
42. By letter of 17 July 2013 the Claimant was written to by Wendy Missons, the Head Teacher, further to a meeting held on 12 July with her and Ben Driver. This letter was to confirm a further meeting scheduled for 4 September 2013. The purpose of the meeting was to consider under the Model Teacher Performance Management Policy for Schools “difficulties that have been brought to my attention by your line manager”. She wished to discuss and explore these concerns to clarify expectations and appropriate support measures to facilitate the required level of improvement. The areas that they wanted to consider were certain aspects of the Claimant’s teaching practice specifically:
 - 42.1 To ensure the behaviour and safety of students in lessons is usually good and never less than satisfactory;
 - 42.2 To ensure the good progress of students that the Claimant taught both in individual lessons and across time;
43. The letter stated that it enclosed ‘a copy of the relevant procedure, and page 329 Personal Action Plan which we will complete during the meeting.’ The Claimant was advised where the performance management policy could be obtained on the school’s system. The Personal Action Plan would form the basis of the discussion and would be finalised at the meeting.
44. The head went on:

“You can be assured that this process is aimed at ensuring clarity about the concerns I have and providing support to help you overcome those concerns. An important element of our discussion will be to determine what support you feel you need to help you make the required improvements and it will be useful if you could give this matter some consideration before we meet.”
45. The head advised that she would be accompanied by Ben Driver and Laura Cowan, her Deputy Head, who would manage the action plan. She was happy that the Claimant be accompanied at that meeting by his representative of a professional association or work companion.

46. It was as a result of this email that the Claimant contacted Russell Hammond and arrangements were made for him to attend with the Claimant at 4 September meeting.
47. The tribunal accepts the Head Teacher's evidence at this point that the Claimant was not on the first stage of a formal capability procedure but at this stage they were endeavouring to improve his performance in a supportive manner.

Meeting 4 September 2013

48. This meeting went ahead as planned with Russell Hammond as the Claimant's trade union representative present. For the first time this made it clear that if the Claimant's performance did not improve under the action plans then a first formal capability meeting would be held under the formal capability procedure. Ben Driver is noted as talking through the Personal Improvement Plan (PIP) and reported on the progress that had been made and discussed with the Claimant in July. He is recorded as stating that the behaviour system was still not followed but there had been some progress in other areas but only partial. Mr Hammond is noted as querying the stage the process was in and the Head Teacher confirmed this was not the formal capability process but was a "support and intervention plan through the appraisal process". The draft action plan was read through and amendments made and it was to be reviewed 23 or 24 October and a decision then made as to how to proceed.
49. Neither the Claimant or his union representative raised any issues at that meeting about a diagnosis of Asperger's syndrome or the extreme stress that the Claimant was experiencing.
50. As a result of matters discussed at this meeting Ben Driver arranged for the Claimant to visit Aylsham High School (confirmed in his email of 22 September 2013), a school that had been graded "outstanding" by Ofsted.
51. In addition, the Claimant was sent details of the Improving Teacher Programme to commence in November which was a series of six days over November to December, again at Aylsham High School. The Claimant agreed to attend those sessions.
52. Unfortunately, the minutes of the meeting and the updated PIP were delayed and not sent to the Claimant until 5 October which the head accepted in evidence should not have happened. The time for review however was extended to the week beginning 18 November as a result of that delay.

The Personal Action Plan

53. This set out similar targets to be attained with regard to performance in the classroom as before to be supported by a more comprehensive package of support provided by Ben Driver and Laura Cowan.
54. The Claimant in his own witness statement at paragraph 136 refers to there being “many drop-in learning walks” and indeed states that in his “stressed state the constant possibility of these at any time without warning became harassing”. This was not something he made the Respondent aware of at the time. The Claimant states that there was no feedback from these. In the PIP these were to be performed by Ben Driver or Laura Cowan and the tribunal did not hear from either of those two. The tribunal has no evidence before it with regard to feedback given on those observations. What it does have is the observation by Laura Cowan of 15 October and 8 November and that of Ben Driver of 20 November 2013.
55. In relation to that conducted on 15 October 2013 although details are given of the teaching being given the boxes on the reverse of the form for evidence evaluation and the overall grading of the teacher have all been left blank.
56. In relation to that of 8 November 2013 this has been completed in more detail and the evidence and evaluation sections completed but still showed issues with classroom management and recorded “limited evidence of progress.
57. In relation to Ben Driver’s observation on 20 November 2013 this recorded that some areas were much better but still gave the overall mark of 3 as requiring improvement.
58. The Claimant also had an appraisal with Ben Driver on 25 November 2013 and the teacher appraisal outcome form was seen at page 417. This showed one of his objectives as met, one no longer applicable and the objective of “to improve the standard of the learning environment in lessons” was shown as not met. What was noted was as follows:

“There have been some recent improvements in the standard of the learning environment in lessons. However, this is not yet at a consistent Level 3. Lesson observations over the past year have been graded at 3’s and 4’s for behaviour and safety. Low level off task behaviour does still affect the progress of students in lessons”.

59. In a section headed “Further Notes” it was recorded:

“IW pleased to have moved back to the mathematics faculty although has found it harder to adjust back to teaching mathematics in a new department than expected.”

60. At this time there were also teacher CPD priorities scheduled. This would have of itself necessitated further feedback being given at that time to the Claimant.

Review Meeting 4 December 2013

61. There was a review of the Claimant's performance by the Head Teacher with Laura Cowan and the Claimant's trade union representative present with the Claimant on 4 December 2013. There are no minutes of that meeting.
62. The Claimant in his witness statement at paragraph 144 stated that the Head Teacher told him his progress was not good enough. He was told that if he relinquished his TLR payment voluntarily then this would become a "light touch review" but if he did not then it would become a formal capability procedure. The Claimant describes this in his witness statement as blatant bribery. The Head Teacher explained that she would not have said that but that there had indeed been a discussion which she believed might have been at that meeting to the effect that if the Claimant wished to focus on his teaching then he may wish to give up some of his management responsibilities which might have indeed involved him losing some if not all of his TLR payment. The tribunal takes note that the experienced trade union representative, Russell Hammond, was at that meeting and he is seen later as being well able to raise issues about the Head at meetings if he saw the need to do so. There is nothing raised about this meeting and the tribunal has had to conclude that the Claimant has misinterpreted what the Head said to him on that occasion. The tribunal takes into account that the Claimant says in his own statement he was on the point of breakdown during this meeting but the tribunal is satisfied that would not have been apparent to those at that meeting. It is only shortly after that he commenced a long period of sickness absence.

First period of sickness absence

63. The Claimant was declared unfit to work from 6 December 2013.
64. The first sick note gave the condition as "low mood" and that also appeared on the next two sick notes (page 144-146 of the bundle). The first sick note to state anxiety and depression was that dated 27 January 2014 to 24 February 2014. Thereafter the sick notes say anxiety with depression up to 8 August 2014.
65. The school wished to obtain an occupational health referral and there is reference to this in an email from Katie Randell to the Head Teacher on 8 January 2014. On 10 January 2014 she recorded she had spoken to Russell Hammond, the Claimant's trade union representative, who had stated he had given the Claimant written advice that he needed to complete the form in order to progress the OH referral. Russell Hammond had also mentioned that the Claimant felt he was being harassed by emails coming from the school so Katie asked the Head to request that no further communication came from the school for the time being.

66. In Katie Randell's email to the Head of 8 January 2014 two other employees were mentioned who also appeared to have been employees of the school. Whilst settlement agreements are referred to, the tribunal had no other evidence about the circumstances of those particular individuals.
67. In response to the email about the Claimant feeling harassed by school emails, Wendy Missons replied that she had told colleagues that the Claimant would still be on the "all staff" list. To therefore stop all communication, the Head had no alternative but to take the Claimant off all distribution lists. The tribunal is satisfied that Katie Randell had indeed had discussions with the union about this and would no doubt have continued to do so and that when the school were asked to put the Claimant back on a distribution list, that was what they did. The tribunal does not accept the suggestion put to the Head Teacher in cross-examination that she knew to cut the Claimant off from email contact would cause him further anxiety. She was doing what she thought best having been told that emails from the school were being viewed by him as harassment.
68. In this context it is also necessary to deal with the suggestion put to the Head Teacher that she had told the Claimant's tutor group and Year 11 students he was not returning. The tribunal accepts she did not do so but had to answer, when asked, that she did not know when he would be returning, merely stated that he was off school which may be for a while and that she would let staff and pupils know. She had at that time no reason to say he was not coming back.
69. The Respondent's Procedure 313a 'Improving attendance and ill-health management – model procedure for schools' contains a section dealing with long term sickness absence. It acknowledges that 'the longer an employee is absent, the more difficult it becomes to achieve a successful and sustained return to work'. It therefore encourages 'active management' if a successful return to work is to be achieved. The long term absence management process must be initiated in general when the employee has, or is expected to be, absent for 28 days or more. Some of the exceptions to that period are 'stress, anxiety and depression' when the procedure must be started when the employee has been absent for more than 2 weeks.

Occupational Health Report 25 February 2014

70. This report records it was written after an assessment that took place on 25 February 2014. There had been a face to face assessment with the Claimant. It is noted the Claimant had sought advice from his GP and had just started that day on the appropriate prescribed medication. The medication could take four to six weeks to have its full and beneficial effect. The occupational health adviser therefore recommended that any meeting should not be arranged within the next six weeks and to be held away from the school and also not to be held at the Claimant's home address. The Claimant continued to "present with significant symptoms such as severe sleep disruption, lack of concentration, low levels of motivation and low

mood". Earlier in the report it had been confirmed by the adviser that the Claimant's current absence was due to him developing "severe symptoms of anxiety and depression". With regard to whether the definition of disability was met the adviser felt that "It is unlikely to be covered under the relevant UK legislation" because it had not at that point lasted longer than 12 months. It was her opinion that the Claimant was not fit in any capacity to return to work within the foreseeable future. With regard to the outlook it was difficult to be definitive as it depended on how the Claimant responded to treatment that she suggested a further recovery time of perhaps three to four months may be indicated.

Email from Katie Randell 21 March 2014

71. There must have been a discussion between Russell Hammond and Katie Randell on 20 March 2014 about additional counselling for the Claimant to which she had referred him to her earlier email of 6 February 2014 when she said there would not be an issue with the school with regard to the cost of additional counselling as Norfolk County Council would cover that. What she then went on to state, however, was as follows:

"I have fed back our discussion to the Head. I would like to talk to you about her response. She was unaware (as we all were) that he was on the autistic spectrum."

The tribunal notes that in her witness statement at paragraph 14 when dealing with this email Ms Randell made no reference to the mention of the autistic spectrum.

72. Katie Randell then went on to ask if there was any other support they were able to offer. She specifically stated:

"Wendy has also asked whether there is anything that she can do for Ian? For example, would he benefit from visiting school (maybe not at this point, but in a few weeks)?"

73. Wendy Missons' evidence to this tribunal was that she was appalled when she saw that email as part of these proceedings as she had no recollection of such a conversation. The tribunal cannot accept her evidence. Katie Randell's oral evidence supported what she says in her email, that she was given this information by Russell Hammond and it was, as the email says, fed back to the Head. The email, however, goes further than that as Katie Randell says she would like to speak to Russell Hammond about the Head's response and that the Head would like to know whether there was any other support that they may be able to offer. This was therefore not just a casual mention of the Claimant and his autism but was a more detailed conversation with the Head Teacher. In defence of her position the Head Teacher told this tribunal right at the end of her evidence (and not in her witness statement) that her own sister is autistic and she works with a charity for autistic young people. That, however, only leaves the tribunal to conclude that when Katie Randell mentioned autism, that is something that

would have stuck in the mind of the Head and upon which she should or ought to have acted being aware of the condition. There is no evidence that any action was taken. The tribunal has concluded that the school were aware from this point, 21 March 2014, that the Claimant was on the autistic spectrum.

74. There has been no dispute in these proceedings that there were settlement negotiations between the parties. The Claimant has disclosed a letter from his trade union representative dated 1 April 2014 referring to a settlement agreement and termination of the contract by 30 April 2014. This was now being dealt with by Cliff Anderson in place of Russell Hammond. The Head teacher said in evidence that a negotiated settlement remained an option up to the date of the dismissal meeting.
75. The Claimant continued to be signed off as unfit to work with anxiety and depression and the tribunal saw sick notes as follows:
- 75.1 24 March 2014 for the period to 1 May 2014;
 - 75.2 30 April 2014 for the period to 29 May 2014;
 - 75.3 2 June 2014 for the period to 27 June 2014;
76. The Claimant gave evidence that after the Easter break he was feeling able to apply for other positions and applied for six mathematics teaching posts.

Invite to dismissal hearing 22 May 2014

77. By letter of 15 May 2014 the Claimant was invited to what was described as a “dismissal hearing on the grounds of capability (ill health)”. In the body of the letter the Head Teacher made it clear that the meeting had been convened “to consider the termination of your contract because of lack of capability due to ill health”. The Claimant was advised of his right to be accompanied and told that the Head Teacher would have Katie Randell and Laura Cowan at the meeting. The confidential management report and appendices were enclosed with the letter and would be considered at the meeting. Laura Cowan would present the management case and the Claimant had the right to call witnesses and present any relevant documents. It was made clear that “a possible outcome of the meeting is that your employment at Great Yarmouth High School will be terminated”.
78. An occupational health report had however been obtained dated 20 May 2014. The occupational health consultant (Alix Freeman, RGN/Dip OH) had carried out a validated anxiety/depression evaluation which showed that the depression and anxiety were “now within normal range. He is now recovering well from the symptoms linked to this condition”. The Claimant was fit to attend a meeting and understood the process. If feasible the occupational health practitioner advised that there be short breaks throughout the meeting to help the Claimant re-focus. A return to work was now “more likely to be achieved following the meeting and again if feasible he may benefit from a short phased return. I would advise that he works half days for the first week of return, increasing to three quarter days on

second week, resuming his normal hours on week 3.” It was also advised that a stress risk assessment be carried out pertaining to the role to encourage open discussion and highlight any concerns. The Claimant would benefit from feedback from that assessment. With resolution a good recovery was likely and a return to work likely to be achieved following this.

79. As a result, the meeting scheduled for 22 May was postponed and this was confirmed to the Claimant’s union representative by an email from Katie Randell of 23 May 2014. She suggested a meeting with the Claimant prior to his return to work.

11 June 2014 meeting

80. Minutes of this meeting were seen in the bundle at page 467. The Claimant attended with Cliff Anderson and the Head Teacher and Katie Randell were present.
81. The Claimant states in his witness statement at paragraph 214 that this meeting very quickly turned into a formal absence review meeting during which he was “verbally abused” by the Head Teacher in an “unprofessional and vicious manner”. The Claimant had to leave the meeting.
82. Cliff Anderson emailed Katie Randell on 30 June 2014 confirming that the Claimant had been signed off sick again until 4 July with the reason for his absence being the Head Teacher’s remarks at the meeting on 11 June. He believed they were “ambushed” as he had been led to believe that the meeting was informal. His email went on:

“As it turned out it was clearly a formal meeting to discuss the OH report and Ian’s possible return to work. Having got Ian to the meeting I judged that it was best to continue. However, it was clear to anybody with any sensitivity that the meeting was not easy for Ian and for the Head Teacher to raise capability issues and then to state that his HOD did not want him in the department was at best insensitive and at worst a deliberate attempt to upset Ian and undermine his return to work. It is quite clear to me from the meeting that the Head Teacher does not want Ian back in school. I am currently considering what action to take against the Head Teacher for her appalling attitude which showed little support for, or empathy with, Ian’s situation and in Ian’s words set him back months”.

83. The Head Teacher deals with this meeting at paragraph 21 of her witness statement and says that both the Claimant and she gave their views of the situation. She stated:

“I was candid with Ian by telling him that Ben [Driver] was resistant to him teaching maths. Unfortunately, Ian walked out at that point”.

84. In evidence she told this tribunal that Cliff Anderson said the Claimant had a written document and would like the opportunity to share it at that meeting and read through it. She asked if she could give the school's perception. She felt that the Claimant felt victimised by the school and that if the school was not able to address that perception that view could be reinforced and the Claimant's mind locked down to the opportunity to look more objectively at the situation. She acknowledged that one of the comments she made that was upsetting to the Claimant was that Ben Driver had said he had wanted the Claimant to stay in ICT and not return to the maths department. She felt devastated when the Claimant left the meeting and this was her "accidental error". Most of the meeting, she stated, was the Claimant reading his pre-written statement of stressors. She felt that the meeting was ill defined from the start and that they all had different agendas. She suggested that the minutes show that they were all confused. They were all remiss in not clarifying it further as to what the meeting was about.
85. The minutes are not particularly helpful in confirming what was discussed. They are very brief. It certainly records that the Claimant "outlined his view of events to date" but there is no mention of him reading a prepared statement.
86. Katie Randell responded to Cliff Anderson's email stating that the meeting had been informal and not under any particular HR procedure. She did not agree there was a deliberate attempt to upset the Claimant and believed he had been spoken to "sensitively and calmly". She attached the notes of the meeting. She did not think it was inappropriate that performance concerns had been mentioned in brief. She did not suggest anything in an attempt to repair the situation and support the Claimant.
87. Cliff Anderson raised this again at the appeal. He stated that the Head's words had been 'totally unacceptable and inappropriate'. He questioned that if she had 'genuinely wanted to support him she should not have raised those issues in that way or at that time.'

Return to work meeting 8 September 2014

88. At this meeting the Head Teacher agreed to a four-week period of return with the Claimant starting on 9 September 2014. It was agreed that the Claimant would attend a meeting during the third week of the phased return on 29 September with regard to capability. The notes record that the result of that meeting would determine the level of support he required for the fourth week.
89. Cliff Anderson is noted in the minutes as asking if the accompanying action plan could include a stress risk assessment and the minutes' state "Katie Randell agreed that she could draft a plan for Ian and Cliff to consider".
90. No stress risk assessment or action plan was ever done. Katie Randell told this tribunal that she could not do the plan but that the stress risk assessment form was given to the Claimant and it was for him to complete the stressors on it in the first instance but he did not do so.

91. The tribunal saw a blank form in the bundle. Part 1 clearly states it is for the employee to complete stating the perceptions and feeling about the current situation, specific instances of why the feelings and perceptions exist, the most significant issues the individual wish to be addressed and the individual's proposals about how each of these issues should be addressed. The Management of Stress at Work Policy and Guidance also placed a responsibility on the individual (alone with Head Teachers and Line Managers) to 'identify causes of stress in the work place and report them to their line manager and to take responsibility for their own well being at work'.
92. Katie Randell accepted in evidence that the stress action plan was not chased up by her or management. However, she felt that at both meetings in September when Claimant was present with experienced trade union representative that the Respondent had put in place comprehensive support and there was every opportunity for more to be requested but it was not. The minutes note that the school counsellor, Jamie Geary would provide support to the Claimant. It is noted in the meeting longhand notes of the dismissal meeting that the Claimant had accessed support from James Geary.
93. By letter of 22 September 2014 (during the phased return to work) the Claimant was invited by Laura Cowan to a meeting on 29 September 2014 to discuss his performance. It was made clear in that letter that if improvement was not forthcoming, albeit at a later stage, the matter might lead to the formal capability procedure.
94. An outcome letter was seen in the bundle at page 496A dated 7 October 2014 enclosed a personal action plan confirming the points discussed. They were to meet on 26 November 2014 to review the progress. This was put back to 10 December 2014.
95. The Claimant was signed off sick on 9 December 2014 and never returned to work again.

Occupational health report 5 February 2015

96. This report confirmed severe anxiety and mild/moderate low mood. The Claimant remained unfit for work and a return in the near future was unlikely. No management advice was given. The Respondent, having not acted upon the information that the Claimant was on the autistic spectrum, took no action to refer that information to the OH adviser.
97. By letter of 13 February 2015 the Claimant was invited to a meeting on 25 February 2015. This was again described as an "ill health dismissal hearing".
98. The tribunal saw in the bundle further emails between Katie Randell and the union representative referring to settlement negotiations. The tribunal is satisfied having in particular read those of the 9 and 12 February 2015

(p513) that the Respondent was making it very clear that either the Claimant entered into a settlement agreement or they proceeded to an 'ill health dismissal hearing'.

99. By email of 25 February 2015 Cliff Anderson advised the Claimant would not be attending the meeting but that he would represent the Claimant in his absence. He attached documents to be referred to at the hearing. This included a response to the management report and comments about the June 2014 meeting which had been received that morning together with a chronology.
100. Page 535 is the management report and page 539 is the same report with the Claimant's comments in it. The management report had been prepared by Laura Cowan and makes no reference to anyone at the school having been informed of the claimant being on the autistic spectrum. The report concludes:

'The decision has been taken to dismissal now for the following reasons'

This was before the meeting had even taken place.

101. The tribunal saw long hand notes of the meeting which noted in the conclusions the Claimant's position as expressed by his trade union representative that the school's actions were responsible for this work related absences.
102. The outcome decision was that the Claimant be dismissed because of capability through ill health. It recorded that Cliff Anderson had acknowledged that the performance management process had been the trigger for the deterioration in the Claimant's condition.
103. By letter of 9 March 2015 Cliff Anderson submitted the Claimant's appeal stating that this was on the grounds that the dismissal was unreasonable and unfair given the evidence presented and the failure of the school to adequately support him from September 2011 onwards. He supplemented this by email of 10 March 2015 to add that they would also rely on the alleged failure by the school to follow its own and Norfolk County Council's procedures and policies as well as the failure to exercise its obligations of duty of care towards the Claimant.

Appeal hearing 17 April 2015

104. The tribunal did not hear from any of the panel of three Governors. It heard from Ian Cooper, employee relations manager for Norfolk County Council who was present, as was Katie Randell.
105. The Claimant presented a further document which is believed to be that at page 546(1) which is headed "Appeal Hearing". This document ran to 32 pages. In the 4th bullet point under 'summary outcome' the Claimant referred to being on the autistic spectrum as follows:

'...I am aware that I am on the autistic spectrum along with many people in education; it is not rare. I am however unable to understand or deal with being bullied. I was first told this about myself when my son was receiving support in 2007...'

106. The Head teacher presented the management case. In answer to questions from the governors the Head stated:

...IW had shown limited awareness of the impact of his absence on students or other members of staff. This may be related to his autism, although the school had not been aware of this condition. IW had taken no responsibility or accountability...'

107. Mr Anderson emphasised that the stress the Claimant had experienced was 'solely work related':

'...The school counsellor had not responded quickly or informed IW where he was based. IW felt himself to be on the autistic spectrum and said he could not deal with being bullied...There had been no work related problems prior to 2012. His absences had not been due to attempts by the school to improve his performance as a teacher. They had been due to targets and predetermined outcomes...'

108. The appeal hearing was not successful and the dismissal was upheld. An outcome document was seen in the bundle at page 584. There is no mention of any discussion of autism. The Committee expressed concern 'about some elements of management practice' in the case but they were not sufficient to undo the dismissal decision. In particular, they expressed concerns that although OH had recommended a stress risk assessment for 'reasons not clearly established' the stress risk assessment recommended by OH did not take place' stating that after the meeting in September 2014:

'What is unfortunate is that no individual present at that meeting followed this up to highlight that a stress action plan had not been drafted or discussed'

109. They also had 'wider concern' about notes of such meetings as it had become clear at the hearing that the school did not have a 'sound process for ensuring that notes were taken and then distributed to those involved with a check for accuracy built in'.

110. They noted that the Claimant had found the school counsellor 'difficult to access'

111. In relation to the June 2014 meeting that the Head should not have used that meeting as an opportunity to go into performance issues. It found:

'There was no evidence to show (and no suggestion from either side) that the meeting was convened with the purpose of discussing

performance concerns, in fact no evidence was presented to show that this meeting was convened through a letter from Ms Missons explaining its purpose. The Committee also believed that Ms Missons exercised poor judgment by making comment in that June 2014 meeting to the effect that Ben Driver, the Head of Department, 'did not want Mr Wells back in Maths'

Joint medical report

112. A joint medical report was obtained for these proceedings from Dr Obianuju Ugochukwu dated the 29 February 2016 prepared following interviews with the Claimant on 19 and 23 February 2016. This confirmed that a formal diagnosis of Asperger's Syndrome was made on 23 February 2016. This is a lifelong diagnosis and the effect is long term and will last for the rest of the Claimant's life. The Claimant also suffered from anxiety and depression which had lasted for more than 12 months.
113. The report highlighted the difficulties the Claimant experiences in dealing with change. He does not always pick up non-verbal clues so this affects his social interaction with others. If he is in an environment where he does not receive the right support, he is prone to stress, anxiety and depression. This has a substantial adverse effect on his ability to carry out normal day to day activities. Whilst at the date of the report the Claimant was working in an environment supportive of his needs it is more probable than not that if the claimant was in an unsupported environment then his difficulties will return.
114. In an addendum dated 8 June 2016 in answer to the Respondent's questions Dr Ugochukwu confirmed that the Claimant's anxiety and depression had a substantial impact on his day to day activities from January 2013. He concluded that:

'Generally people with Asperger's syndrome are more likely to suffer from mental health problems. It is also noted in psychiatric literature that people who already have a history of anxiety and depression are more likely to suffer further episodes in the future. Mr Wells' Asperger's syndrome puts him at increased risk of anxiety and depression. He has already suffered from anxiety and depression so it is more probable that his anxiety and depression will reoccur especially if he is not in a supportive environment'

Relevant Law

115. The Claimant brings claims under the Equality Act 2010 (EA) and the following provisions are relevant.

Disability

116. Section 6(1) provides:

'A person (P) has a disability if –

- (a) P has a physical or mental impairment, and*
- (b) the impairment has a substantial and long term adverse effect on P's ability to carry out normal day-to-day activities.*

117. Schedule 1 Part 1 EA assists with the determination of disability. With regard to 'long-term effects' section 2 of the Schedule states:

"(1) The effect of an impairment is long-term if—

- (a) it has lasted for at least 12 months,*
- (b) it is likely to last for at least 12 months, or*
- (c) it is likely to last for the rest of the life of the person affected.*

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."

118. Appendix 1 to The Code of Practice on Employment (2011) is 'included to aid understanding about who is covered by the Act...' and deals with the meaning of disability. It provides in particular:

"What if a person has no medical diagnosis?"

7. There is no need for a person to establish a medically diagnosed cause for their impairment. What it is important to consider is the effect of the impairment, not the cause.

What is a 'substantial' adverse effect?

8. A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.

9. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation.

10. *An impairment may not directly prevent someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse long-term effect on how they carry out those activities. For example, where an impairment causes pain or fatigue in performing normal day-to-day activities, the person may have the capacity to do something but suffer pain in doing so; or the impairment might make the activity more than usually fatiguing so that the person might not be able to repeat the task over a sustained period of time.*

...

What if the effects come and go over a period of time?

13. *If an impairment has had a substantial adverse effect on normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur; that is, if it might well recur.”*

Direct discrimination

119. Section 13(1) EA provides:

“(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Discrimination arising from disability

120. Section 15 EA provides:

“(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.

121. The Code of Practice gives further guidance in Chapter 5. In particular, at para 5.8 - 5.10 it provides assistance on what does ‘something arising in consequence of disability’ mean:

- 5.8** *The unfavourable treatment must be because of something that arises in consequence of the disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability.*
- 5.9** *The consequences of disability include anything which is the result, effect or outcome of a disabled person's disability. The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to walk unaided or inability to use certain work equipment. Others may not be obvious, for example, having to follow a restricted diet*
- 5.10** *So long as the unfavourable treatment is because of something arising in consequence of the disability, it will be unlawful unless it can be objectively justified, or unless the employer did not know or could not reasonably have been expected to know that the person was disabled (see paragraph 5.13).*

Indirect discrimination

122. Section 19 EA provides:

- "(1) *A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
- (2) *For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
- (a) *A applies, or would apply, it to persons with whom B does not share the characteristic,*
 - (b) *it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
 - (c) *it puts, or would put, B at that disadvantage, and*
 - (d) *A cannot show it to be a proportionate means of achieving a legitimate aim.*

Duty to make reasonable adjustments

123. Section 20 EA sets out the duty. Subsection (3) provides:

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

124. Schedule 8 then applies where the duty arises. Part 3 sets out limitations on the duty and provides at paragraph 20(1):

“20(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

- (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;*
- (b) ...that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.*

125. The Code of Practice deals with the duty in Chapter 6. In particular, it gives guidance on knowledge at paragraphs 6.19:

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

126. At paragraph 6.32 onwards the Code gives examples of adjustments in practice.

6.32 It is a good starting point for an employer to conduct a proper assessment, in consultation with the disabled person concerned, of what reasonable adjustments may be required. Any necessary adjustments should be implemented in a timely fashion, and it may also be necessary for an employer to make more than one

adjustment. It is advisable to agree any proposed adjustments with the disabled worker in question before they are made."

Submissions

127. Both representatives handed up written submissions and it is not proposed to set them out again here.

Conclusions

128. Each of the issues has been set out in italics below for ease of reference and will be dealt with in turn.

Disability

Asperger's Syndrome

129. The Respondent has now acknowledged that the Claimant is disabled by virtue of Asperger's syndrome but not from anxiety and depression. There is however an issue about knowledge of the Asperger's. From the findings made the tribunal is satisfied that the school knew that the Claimant was on the autistic spectrum from at least 21 March 2014.

Anxiety and depression

130. This was first referred to in a sick note of 27 January 2014 and in the OH report of February 2014. At that time the Claimant had been prescribed medication, it was recommended he did not attend any meetings for 6 weeks and he was signed off till 27 June 2014. However, in the OH report of the 20 May 2014 after a 'validated anxiety/depression evaluation' both conditions were within the normal range and the Claimant was recovering well from the symptoms linked to this condition. However, following the meeting on 11 June 2014 the Claimant again was off sick.
131. The Claimant returned to work on 8 September 2014 to then be signed off from 9 December 2014 not to return.
132. The OH reports and the Claimant's impact statement make it clear that during the periods off sick the condition did have a substantial adverse effect on the Claimant's ability to carry out normal day to day activities. In the first report of February 2014 the Adviser concluded that the Claimant had 'severe symptoms of anxiety and depression'. He explains how he was not interacting with his family, remaining isolated and not communicating. He had difficulty coping with unpredictable situations and change and needed longer time to plan and adapt.
133. The statute makes it clear that for a condition to be considered 'long term' it must have lasted 12 months, be likely to last 12 months or likely to last

for the rest of the life of the person affected. Even if an impairment has ceased to have a substantial adverse effect it is to be treated as continuing if it is likely to recur.

134. The tribunal is satisfied from the medical evidence that as someone with Asperger's Syndrome the Claimant is more likely to suffer severe and long term bouts of anxiety and depression. Even if it could be argued that the substantial adverse effects had not lasted 12 months, they are clearly likely to recur for the rest of the Claimant's life. The anxiety and depression are inextricably linked to his Asperger's syndrome. The Respondent was in possession of sick notes stating anxiety and depression from January 2014. Although the Claimant returned to work he was again signed off. The Respondent had knowledge of the Claimant being on the autistic spectrum in March 2014 and also ought reasonably to have known that he was more likely to suffer from anxiety and depression (mentioned on the sick notes from January 2014)
135. The tribunal does not accept that the Respondent should have been alert to the disabilities in early stages when the certificate said 'low mood.' Further despite the view expressed in February 2016 by the joint expert the Respondent could not reasonably have been expected to have known from January 2013. Dr Ugochukwu's conclusion is from his expertise on reviewing all of the history but from February 2016 backwards. His view was informed by what had then occurred.
136. The Respondent had knowledge that the Claimant was on the autistic spectrum from March 2014 and ought reasonably to have known that the anxiety and depression flowed from that condition.

Direct Discrimination (Section 13)

The Claimant asserts that he was treated less favourably in relation to the decision of the then Head Teacher, Wendy Missons, to subject him to performance management during 2013-14 when his class was out-performing the Respondents' two other math's sets. The Claimant relies upon Jemima Parkhurst as a comparator.

137. The tribunal does not find this claim to be made out. The performance management started with a PIP in March 2013 at a time before the Respondent knew of the Asperger's syndrome. This did not commence 'because of' the Claimant's disability but due to concerns about his performance.
138. The Claimant's counsel accepted in submissions that Jemima Pankhurst was in a more senior role and not comparable. A hypothetical comparator about which the Respondent had the same performance concerns would have been subjected to performance management.
139. The tribunal does not accept that the Head made stereotypical assumptions about the Claimant's condition and that he could not do the

job. The performance monitoring had commenced before she was alerted to the fact he was on the autistic spectrum.

Disability Related Discrimination (Section 15)

Was the permanent alteration of the Claimant's duties unfavourable treatment because of something arising in consequence of the Claimant's disability?

140. It was accepted at paragraph 59 of the submissions made on behalf of the Claimant that in fact the move to ICT was not permanent. Orally Counsel submitted that the alteration of duties was likely to have a disproportion adverse effect on someone with Asperger's. That was not the pleaded issue or the one clarified at the outset of these proceedings and it is too late to raise it in submissions.

141. In any event this tribunal has concluded knowledge of the disability in March 2014 but the move to ICT was in 2011 and then back to Maths in 2013. It was not unfavourable treatment arising from disability.

Was dismissal for sickness absence caused by depression and anxiety unfavourable treatment because of something arising in consequence of the Claimant's disability?

142. The tribunal must conclude from its findings that the Claimant was dismissed for absences arising out of his disability. The dismissal was clearly 'unfavourable treatment'.

If so, did or should the Respondents have been aware of the Claimant's physical and mental impairment with a substantial long-term effect on his ability to carry out day to day activities.

143. The tribunal has found that the Respondent knew or should have been aware of the disability from March 2014

Did the Respondent have a legitimate aim?

144. The Respondent has not shown that the dismissal was a proportionate means of achieving a legitimate aim. Clearly the school had the need for teachers and were incurring the cost of supply teachers but the Claimant's dismissal might have been avoided if the Respondent had taken steps to find out about his condition and the adjustments that could have been made. It was clear from the OH reports and indeed the Claimant's own union representative made it clear that his stressors came from the work environment. The stress risk assessment was never completed and no steps taken to identify the causes of the stress that lead to the Claimant's absences. Further matters set out below in relation to the unfairness of the dismissal are also relevant in this respect.

Indirect Discrimination (Section 19)

Did the Respondents apply a provision, criterion or practice (PCP) to the Claimant which placed or would place the Claimant with his disabilities at a particular disadvantage?

145. The Claimant relies upon two PCPs:

(a) *The Respondents' power to vary the duties of its teachers;*

The tribunal does not find that the Respondent applied such a PCP there being no evidence of such. The Claimant clearly agreed to move to ICT and even applied for the senior role. There has been no suggestion that the move was forced upon him. Even if there was such a PCP for the same reason it is difficult to see the particular disadvantage. Further the tribunal has found knowledge from only March 2014 and the move occurred before that date.

(b) *The Respondents' absence procedure and that the employee had to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanction".*

Did the Respondents' PCPs place the Claimant at the same disadvantage?

146. The Respondent's policy with its trigger points in it clearly put those with a disability at a particular disadvantage and did put the Claimant at such, even though the policy states that disability related absences 'may need to be discounted'. The Claimant's anxiety and depression and autism made him more likely to trigger the absence procedure and put him at risk of dismissal than those that did not share his disabilities.

147. For the same reasons as set out above the Respondent has failed to satisfy the tribunal that the Claimant's dismissal was a proportionate means of achieving a legitimate aim.

Failure to Make Reasonable Adjustments (Sections 20 and 21)

If the tribunal finds the Respondents had applied PCPs, which placed the Claimant and those who shared his disabilities at a particular disadvantage, can the Respondents demonstrate that it took all reasonable steps to reduce that disadvantage?

Alternatively, have the Respondents proved that they could not have known of the Claimant's disabilities?

148. The tribunal only finds a PCP in relation to the sickness absence procedure as stated above. From March 2014 the Respondent took no steps to ascertain the nature of Claimant's condition even though aware of

it. It never therefore explored adjustment that might have been of assisted as outlined now in Dr Ugochukwu's report.

Unfair Dismissal

The Claimant accepts that there was a potentially fair reason to dismissal, namely capability.

The question arises, was the dismissal within the range of reasonable responses? In that respect the Claimant asserts:

- (a) dismissal was an act of discrimination for the above reasons;*
- (b) the Respondents failed to consider alternatives to dismissal; and*
- (c) the decision was pre-judged.*

149. The Respondent dismissed the Claimant for capability a potentially fair reason for dismissal. It must follow that it acted unfairly in treating that as a reason for dismissal in circumstances which the tribunal have found as discriminatory.
150. The capability procedure was started within return to work period when the Claimant had not had the opportunity of completing the phased return or to get back into teaching maths after a significant break.
151. When observations commenced there was a lack of consistent feedback to the claimant on his performance, for example that for 15 October 2013 is blank.
152. The Claimant had difficulty getting hold of the appointed Counsellor.
153. The Respondent's lack of knowledge of the condition meant that no consideration was given to the appropriateness of 'walk in' assessments that added to the Claimant's stress levels.
154. The Head teacher at the meeting in June had already told the Claimant that no one wanted him back.
155. There was no consideration given to any alternatives to dismissal save a settlement agreement
156. The Appeal could have but did not rectify the unfairness as although the Claimant's condition was raised it does not appear to have been considered by the panel.
157. There is however no evidence from which the tribunal can draw the inference suggested by Counsel for the Claimant at paragraph 40 of her submissions that Ms Misson made stereotypical assumption about the Claimant's autism. There is no hint that she was drawing on knowledge of his sister.

158. Even though finding the dismissal unfair the tribunal cannot accept the submissions made on behalf of the Respondent that when it comes to the issue of remedy there should be a 100% deduction under the principles set out in *Polkey*.
159. Submissions would need to address whether the employment would have continued. There may be an argument that even with all the appropriate adjustments the Respondent might have continued to have performance management concerns. These may have led to the employment terminating at some stage. The percentage chances of this would have to be considered at a remedy hearing.

CASE MANAGEMENT ORDERS

1. The Claimant to file and serve an up dated schedule of loss within 28 days of this decision being sent to the parties
2. The Respondent to file and serve a counter schedule within 14 days thereafter
3. The parties to provide their joint time estimate for a remedy hearing within 28 days thereafter with dates to avoid for the following 3 month period.

Employment Judge Laidler, Bury St Edmunds

Date: 23 February 2017
JUDGMENT SENT TO THE PARTIES ON

.....
.....
FOR THE SECRETARY TO THE TRIBUNALS