EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondents**
Mrs A Talbot	AND	(1) Somerset County Council (2) The Governing Body of Critchill School (3) The Midsomer Norton Schools Partnership

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol **ON** 16 to 20 December 2019

EMPLOYMENT JUDGE J Bax
MEMBERS: Ms J Le Vaillant
Mr E Beese

Representation

For the Claimant: Mrs Girling (lay representative)
For the Respondent: Mr Shepherd (Counsel)

RESERVED JUDGMENT

The claims of discrimination arising from disability and a failure to make reasonable adjustments are dismissed.

REASONS

The claim

1. In this case the Claimant claimed that she had been discriminated against on the grounds of disability. The Respondent denied the claims.

2. On 14 May 2019 Employment Judge Gray conducted a Case Management Preliminary Hearing, by telephone, at which the Claimant was represented by Counsel and she was ordered to provide further and better particulars.

3. The Further and Better Particulars of the claim, drafted by Counsel on 28 May 2019, clarified that the Claimant relied upon the disabilities of ADHD and fibromyalgia and that she brought claims of discrimination arising from disability and failures to make reasonable adjustments. The First and Second Respondent's filed an amended response dated 7 June 2019.

4. At a Telephone Case Management Preliminary Hearing before Employment Judge Maxwell on 21 June 2019, it was indicated that it might be necessary to seek to add the Third Respondent as a party to the proceedings. On 28 June 2019 a joint application between the Claimant and First and Second Respondent's was made to join the Third Respondent. On 10 July 2019, Regional Employment Judge Pirani ordered that the Third Respondent was joined to the proceedings. The claim was not served on the Third Respondent, however on 12 December 2019 the solicitors acting for all three Respondents confirmed, by e-mail, that the Third Respondent relied upon the response submitted on behalf of the First and Second Respondents as its defence to the claims.

5. On 21 October 2019, Employment Judge Cadney, at a telephone Case Management Preliminary Hearing amended the case management directions and adjusted the timetable for the Final Hearing.

The issues

6. The Claimant was represented by Counsel at the Telephone Case Management Preliminary Hearing on 21 June 2019, during which Employment Judge Maxwell identified the issues in the case as follows:

<u>Discrimination arising from disability</u>

7. The allegation of unfavourable treatment was "the disciplinary sanction issued on 20 September 2018, and the failure to retract it via the appeal process or grievance process.

8. The something arising in consequence of the disability relied upon was, "the Claimant's behaviours and/or the chain of events precipitated by the Respondent's provision of the incorrect training."

9. The Respondent relied upon a justification defence and asserted that the legitimate aim was, "to ensure a safe and supportive working environment for its staff where each employee treats others with dignity and respect and

employees are able to put forward concerns without fear of recrimination and/or detrimental treatment."

Reasonable Adjustments

10. The Provision, Criterion or Practice ("PCP") relied upon was, "expecting a high level of politeness and/or a high standard of behaviour at work, as encapsulated by the School's Code of Conduct Policy which requires "consistent demonstration of 'high standards of behaviour'"".

11. The substantial disadvantage was that, "her disability of ADHD causes her to engage in behaviour that is likely to offend the requirement in the PCP more frequently, resulting in an increased likelihood of disciplinary action against her.

12. Did the Respondents not know, or could they not reasonably be expected to know that the Claimant was likely to be placed at the disadvantage set out above.

13. The following matters were suggested as reasonable adjustments:

   (a) Providing the recommended training to the Claimant's colleagues and senior members of staff about her disability, so as to enable them to understand the Claimant's behaviours and to prevent complaints from them about perceived poor behaviour by the Claimant prompting disciplinary action, and/or to inform decision making by senior members of staff about whether or not to impose any disciplinary sanction,
   (b) Refrain from issuing the Claimant with a warning in view of the Respondent's failure to provide the correct training and the link between the Claimant's behaviours and her disability
   (c) Retract the warning at any point subsequently, and in particular via the appeal process which concluded on 10 December 2018 or via the grievance process which the Claimant initiated and which concluded on 21 January 2019
   (d) Provide correct training in the near future in any event (irrespective of the tribunal's conclusions in relation to the disciplinary warning).

14. At the start of the hearing, it was confirmed, by the Claimant's representative, that the reference to a warning received in 2017 was by way of background only and that it was not included as a head of claim. It was broadly confirmed that the issues contained in the order of EJ Maxwell were the issues to be determined. The Claimant's representative said that in addition to the imposition of the written warning the discrimination arising from disability claim also included that witnesses for the disciplinary hearing had spoken about the Claimant in public. This issue was not apparent from the claim form, further and better particulars or the case management summary. The

Claimant's representative also said that had been a failure to make reasonable adjustments in relation to the work coach. Discussion took place as to whether these matters were being relied upon as background to the issues already identified or whether they were separate heads of claim. It was explained that if it was a new allegation that an application to amend would be required and the Respondents indicated that all of the witness evidence it relied upon only addressed the issues identified in Employment Judge Maxwell's order and had not specifically addressed the speaking to witnesses point. The Claimant was informed that if an amendment was granted that it was possible the hearing would need to be adjourned or could not be completed in the time allowed. The Claimant and her representative took time to discuss matters. The Claimant confirmed that she did not want to include the witness point as an allegation of discrimination, but wanted to refer to it as background. The Claimant confirmed that she relied upon the provision of a work coach as a reasonable adjustment. Counsel for Respondent was content to proceed on this basis.

15. Counsel for the Respondents agreed that the PCP, as set out in the list of issues, was capable of being a PCP for the purposes of the EqA, but that the decision was taken not to discipline the Claimant for the incident during the training and therefore it did not apply to her. It was also conceded that the Claimant would have been put to substantial disadvantage by the PCP, but that it was disputed they knew of the substantial disadvantage or that it ought to have been known.

16. The remainder of the first day was used by the Tribunal to read the witness statements and briefly look at the documents referred to therein.

17. On the second day the Claimant and her witness gave evidence and the Respondents' first witness gave evidence. At the start of the third day it was raised with the Claimant's representative that cross-examination the previous day had appeared to relate to making reasonable adjustments to the disciplinary and investigation process. These had not been included in the issues agreed to be determined at the start of the hearing or in the previous case management hearings. The Respondents' witness evidence had not addressed such issues. It was explained to the Claimant that if she sought to include them, the Respondents would say that it needed to address those issues in its witness statements and the Claimant would need to be recalled to be further cross-examined and that it was unlikely that the case would be concluded in the time allowed and would need to be rescheduled for a future date. Counsel for the Respondents also indicated that it was likely a costs application would be made against the Claimant. The Claimant and her representative took some time to consider how they wanted to proceed. The Claimant's representative said that the Claimant wanted to proceed but was unclear of the basis. After explaining the legal tests again, the Claimant was given further time to discuss with her

representative, after which they confirmed that the issues that were required to be determined were those as set out in the case management order of Employment Judge Maxwell, but also including the work coach training as part of the reasonable adjustments claim.

18. The Claimant's representative cross-examined the Respondent's second witness, Mr Armstrong, but often asked questions that were unrelated to the issues to be determined. The Claimant's representative was reminded as to the issues to be determined and that it was important for her to be focused in her questioning. The Judge also provided assistance to the Claimant's representative, with the framing of some of the questions. After the luncheon adjournment the Claimant's representative was reminded about the need to focus on the issues to be determined and that there was limited time in the case. It was agreed that the Claimant would ask Mr Armstrong questions for a further 55 minutes and she would be able to cross-examine the next witness for 2 hours. After this the questions by the Claimant's representative were focused to the issues and the evidence was completed in accordance with the agreed timetable.

Adjustments during the hearing

19. Prior to the start of the hearing the Claimant tried sitting in various chairs, in order to ascertain which would be most suitable for her. The Claimant selected an appropriate chair and used it throughout the hearing. It was also understood that the Claimant would require frequent breaks. She was accompanied by mental health advocate, Ms Conboy, who would also be able to indicate to the Tribunal when breaks were necessary. Frequent breaks were taken during the hearing, to assist the Claimant in minimising the effects of the stress.

20. The Claimant did not want to see Mr Armstrong when she was giving evidence. In order to minimise stress for the Claimant it was agreed that she would remain at her seat, rather than give evidence from the Witness Table. The Claimant was happy to proceed on this basis.

The Evidence

21. We heard from the Claimant and also Ms Carlson on her behalf. We heard from Ms Haines (interim joint deputy head teacher and disciplinary investigating officer), Mr Armstrong (head teacher and disciplinary chair), Ms Southwood (Governor of Critchill School and disciplinary appeal chair), Ms Hudson (Chair of Governors of Critchill School and grievance investigation officer), and Ms Probert (School Business Manager of St Louis Catholic Primary School and Chair of governors of Westfield Primary School and grievance appeal chair) on behalf of the Respondent. We were provided with a witness statement from Mr Culpin (National Leader of Governance with no

direct involvement with the School and Grievance chair), who was unable to attend the hearing on behalf of the Respondents and therefore little weight was attached to his statement.

22. We were also provided with a bundle of documents, in excess of 750 pages and a supplementary bundle of 325 pages. Any references in square brackets, in these reasons, are references to page numbers in the main bundle.

23. There was a degree of conflict on the evidence.

Facts

24. We found the following facts proven on the balance of probabilities, after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

25. The Claimant was employed by the First Respondent from 1 October 2005 as a teaching assistant at Critchill School ("the School"), which provides education for pupils who have a Statement of Special Educational Needs and/or an Education, Health or Care Plan.

26. On 1 June 2019 the Claimant's employment transferred, pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006, to the Third Respondent when the School became an academy and joined its partnership.

27. The Second Respondent is the governing body who had responsibility for staffing and procedural matters at the School at the times material to this claim

28. The Claimant was disabled at the material times by reason of ADHD and Fibromyalgia. The Second Respondent first knew about the Fibromyalgia in about October 2013 and the Claimant informed the Second Respondent in 2017 that she had a working diagnosis of ADHD. The Respondents accepted that they had knowledge of the Claimant's disabilities at all times material to this claim.

29. The School's Code of Conduct stated that "School staff have an influential position in the school and must act as role models for pupils by consistently demonstrating high standards of behaviour … We expect all support staff, governors and volunteers to act with personal and professional integrity, respecting the safety and wellbeing of others." It also referred to staff members to "treat pupils and others with dignity and respect". It also stated

that any "failure to follow the code of conduct may result in disciplinary action being taken."

30. The School disciplinary policy provided that minor issues of conduct would be dealt with informally. Where the conduct was more serious the following sanctions were open to the Second Respondent: verbal warning, written warning between 6 and 12 months, final written warning and dismissal.

31. In February 2014 Dr Pridham, Clinical Psychologist provided a report to the Claimant's GP [p78] following an assessment and concluded that the claimant had features of ADHD (predominantly inattentive type) with mixed cognitive profile. This was not provided to the School at that time.

32. Occupational Health reports were prepared on the Claimant on 4 November 2016 and 19 December 2016, neither of which made reference to ADHD.

33. On 7 March 2017 OH Assist provided a report to Elaine Shobbrook, Critchill School Business manager, [P97], which said that the Claimant had long term conditions of fibromyalgia and ADHD. It was recorded that, the Claimant had said, due to her conditions, she had difficulty retaining new information and had some impairment to concentration and memory. It was concluded that the conditions were likely to be considered disabilities. We accepted Mr Armstrong's evidence was that he was aware that the Claimant had ADHD traits from this point, namely inattentiveness, hyperactivity and not being able to concentrate for long periods of time. We also accepted that he had not seen a formal diagnosis.

34. On about 13 March 2017 the Claimant attended a disciplinary hearing, following which she was given a formal written warning for 12 months. In a statement prepared for the meeting the Claimant said that she had ADHD. At the disciplinary meeting the Claimant said that she had been diagnosed by Dr Hussain and Dr Pridham. The Claimant said that she had not realised that ADHD was impacting on her and that she required help and that she had not received any guidance or strategies and would attend training [p101]. The Claimant also recognised that her behaviour was not a good role model. The Claimant also provided a list of reasonable adjustments that she requested [p108 to 110] which included disability awareness training for managers and co-workers and modifying disciplinary or grievance procedures and personalised training and support in relation to her disabilities.

35. The Claimant appealed the outcome and the appeal process concluded on about 28 April 2017. In the outcome letter Ms Hudson, chair of appeal panel, said "we recognise that this has been a difficult time for you and at the point you are deemed fit to return to school and the formal outcome from your ADHD assessment is known, provision will be made for a review of your risk

assessment and any reasonable adjustments to be carried out to enable you to fulfil the full remit of your role at Critchill School."

36. On 6 September 2017 OH Assist provided a further Occupational Health report. No mention was made of ADHD and it was suggested that the Claimant might benefit from a workplace assessment to determine her exact capabilities. Mr Armstrong decided to implement this recommendation by utilising the services of Access to Work, which provided funding for independent and specialist advice to employees and employers and thereafter funding for equipment and courses to assist those with disabilities.

37. On 11 September 2017, the Claimant returned to work. In the notes of the return to work meeting, Mr Armstrong said that "*she did not have a diagnosis of ADHD and that AS (the Claimant) would have to have a diagnosis in order for the school to fully consider the implications*." The Claimant showed Mr Armstrong the assessment from 2013, carried out by Dr Pridham. The Claimant was advised to return to Dr Pridham for further assessment if she thought it was important. In cross-examination, the Claimant agreed that, from that point, she was aware of the importance of the Code of Conduct to the school. In oral evidence the Claimant said that she took what was recorded in the notes as her not being able to speak to Access to Work. Mr Armstrong was not questioned about this. We did not accept the Claimant's evidence on this point, she referred to ADHD in the subsequent Access to Work report, which strongly suggested that she did not have an understanding that she should not refer to ADHD.

38. On 22 September 2017 the Claimant attended a Phased Return to Work meeting [p129-130]. It was suggested to the Claimant in cross-examination that she did not mention ADHD in relation to the section on which parts of the job she found difficult. The Claimant said that she did not know she had a problem with ADHD or the effect it had on people; this was contrary to what she had said previously during the disciplinary process earlier that year.

39. An Access to Work Holistic Assessment report was produced on 28 September 2017 [p135-146]. The Report said that the Claimant was diagnosed with Fibromyalgia in 2012, had a working diagnosis of ADHD and she had 'brain fog' due to her fibromyalgia and fatigue. It was recommended that the Claimant was provided with Workplace Coping Strategy Training and that her colleagues should have disability awareness training. The Respondent's application for funding to provide the training and provision of a chair was granted on the same day [p133].

40. On 2 October 2017 the Claimant attended a phased return to work meeting with Mr Armstrong, at which he said he had received the Access to Work report that day and would review it and contact the suppliers. No discussion took place about ADHD.

41. A further phased return to work meeting took place on 6 October 2017 [149]. Mr Armstrong confirmed that the chair would be ordered and the providers of the training would be contacted to establish when the training would be delivered.

42. A further phased return to work meeting took place between the Claimant and Mr Armstrong on 13 October 2017 [p152-154], at which the Claimant informed him that she had an appointment with Dr Pridham on 31 October 2017. She was subsequently allowed time off work to attend. The Claimant was informed that the provider of the Workplace Coping Strategy Training would contact the Claimant directly. She was also informed that the disability Awareness Training provider had quoted a higher price than in the report and the School was uncertain whether the DWP would pay as part of the Access to Work programme, as the DWP needed to receive the request from the Claimant. The Claimant agreed to contact the DWP.

43. In relation to the disability awareness training, the Access to Work recommendation included a quotation from The Learning Support Centre, for “Disability awareness support in the workplace” and also provided a quotation number [p140]. on 11 October 2017 Ms Shobbrook received an updated quotation for the disability awareness course from The Learning Support Centre. Mr Armstrong asked Ms Shobbrook to book the course recommended by Access to Work, which she did. Mr Armstrong relied upon the professional advice from Access to Work that the course was suitable and until the delivery of the training did not have reason to question that it was not. On 13 October 2017, The Learning Support Centre offered dates in October and November on which it could provide the course. There was a delay in the Respondent being given authorisation for the funding. Once authorisation had been given, on 24 November 2017, Ms Shobbrook asked The Learning Support Centre to provisionally book a session in the new year and asked for proposed dates. The Training was arranged for 8 March 2018 and the Respondent was sent an invoice for it on 20 February 2018, which was paid the following day. On 7 March 2018 the Learning Support Centre cancelled the training. On 26 March 2018 it was rebooked for 15 May 2018 [p165]. The e-mail confirming the date said that the training would include ADHD as a subject, but made no mention of fibromyalgia. The Claimant says that she did not receive this e-mail due to a problem accessing her e-mails. Although it was suggested that that IT problems occurred at a different time, we accepted that the Claimant did not see the e-mail. Details of the rearranged course were also put on the notice board in the staffroom, however the Claimant did not see it. We were not provided with a copy of the notice.

44. In relation to the workplace coping strategy coaching/training, on 16 October 2017, the First Respondent authorised a purchase order for the Work Coach

to provide the course to the Claimant [p155]. The Claimant then organised the details of the timing and content of the coaching directly with the provider. On 2 February 2018 the Claimant's coaching started and she attended 4 out of 6 sessions before going on sick leave in June 2018.

45. On 19 April 2018, Dr Pridham, Clinical Psychologist provided a draft report to the Claimant [p167], provisionally concluding that the Claimant met the diagnostic criteria for the mild range of ADHD (predominantly inattentive type). It was said that one of the key issues was that there were issues in the Claimant's decision making that sometimes led to her making choices that turned out to be unwise The Claimant provided this to Ms Shobbrook and was told it was not needed.

46. The Claimant was absent from work between 2 May 2018 and 16 May 2018; the reason given was fibromyalgia.

47. On 17 May 2018 the Disability Awareness Training took place. It was attended by the Claimant and 3 other staff members, Ms Payne, Ms Thatcher and Ms Land. The other attendees were not management and did not work in the same classroom as the Claimant. The training included the Equality Act 2010, social and medical model of disability and ADHD [p165]. The Claimant thought that the training would be directed towards her disabilities. The Claimant interrupted and challenged the trainer about the content of the course on several occasions and asked when her disabilities would be talked about so her colleagues could understand her fibromyalgia condition. The other attendees were of the view that the Claimant sounded arrogant and rude. The Claimant on several occasions tried to steer the training back to her own needs. The training related to children in the school, rather than the Claimant's disability in the workplace. In cross-examination the Claimant said that the training did not refer to fibromyalgia, which was the reason why she had asked for it. The training was completed and the trainer was tearful at the end, although the Claimant did not see this.

48. The following morning the Claimant told Ms Shobbrook that the training was inadequate, it was not what she expected, fibromyalgia had not mentioned and there was no advice as to how to support others with a disability. The Claimant also raised that the trainer went home, but had charged for a hotel.

49. After the conversation with the Claimant, Ms Shobbrook spoke to Ms Payne and Ms Thatcher. At lunchtime on 18 May 2018 Ms Shobbrook spoke further to Ms Payne.

50. During a meeting of the senior leadership team ("SLT") of the School, the Claimant's conduct at the training on 17 May 2018 was discussed. In the light of the Claimant's conditions, the SLT did not consider formal disciplinary action to be appropriate. It was considered best for Ms Shobbrook to

informally discuss the matter with the Claimant and remind her that such behaviour was not acceptable

51. On 25 May 2018 Ms Shobbrook spoke to the Claimant. The Respondents say that, Ms Shobbrook advised the Claimant not to contact her colleagues about the training, this was disputed by the Claimant. Later that evening Ms Shobbrook became aware that the Claimant had spoken to her colleagues. Further details and findings of fact are set out below after consideration of the evidence from the subsequent investigation and disciplinary hearing.

52. On about 6 June 2018 Ms Shobbrook informed the SLT that, notwithstanding her conversation with the Claimant on 25 May 2018, the Claimant had contacted all three of her colleagues who had been at the training. This behaviour was considered to be serious and warranted a formal investigation, which Ms Haines was appointed to undertake. Mr Armstrong said in his witness statement, at paragraph 35, that he considered that the behaviour at the training “could be assigned as an effect of her ADHD”.

53. On 8 June 2018 the Claimant attended an absence review meeting, following her absence in May. After the meeting the Claimant received a letter dated 7 June 2018, inviting her to attend an investigatory meeting on 15 June 2018 to discuss alleged concerns relating to harassment, recrimination and misconduct on 25 May 2018. A separate letter of the same date was also sent to the Claimant inviting her to attend a disciplinary meeting on 25 June 2018 in relation to the same allegation. Ms Haines did this in order to ensure that if a disciplinary hearing was necessary, it was scheduled before the end of term, in order to avoid any undue delay. Miss Haines intended this to benefit the Claimant, but accepted in cross-examination that it was a mistake.

54. On 8 June 2018 Ms Haines, as part of her investigation, spoke to Ms Thatcher and took a statement [p286]. Ms Thatcher said that the Claimant had approached her on the last Friday of term and asked if Ms Shobbrook had spoken to her. Further she received various text messages from the Claimant on 25 May 2018. She said she felt that the Claimant was having a go at her and it was making her feel awful. She felt as if she had to avoid work and that the Claimant would keep asking her about it. On 6 September 2019 Ms Thatcher confirmed that she felt harassed by the Claimant at the time. The text messages were part of the disciplinary pack.

55. On 8 June 2018 Ms Haines took a statement from Ms Shobbrook [p321-322], in which she said that on 18 May 2018 the Claimant had advised her the training was inadequate. She asked Miss Payne, who was in reception, how the training had gone and was told that the Claimant wasn’t at all happy and it was very embarrassing. At that point Ms Thatcher arrived and said she was going to speak to Ms Shobbrook about it and said the Claimant’s

behaviour was 'really inappropriate' and the tutor was visibly distressed and after the training the tutor was upset and tearful. At lunchtime, on the playground, Ms Shobbrook spoke to Ms Payne to find out what happened. On 25 May 2018 she met the Claimant at lunchtime to discuss an attendance review meeting and an assessment for a chair. She raised that the Claimant's behaviour had been inappropriate and staff had raised concerns and suggested that in future the Claimant should voice any concerns or feedback privately at the end of the session. The Claimant wanted to know what the staff had said, and Ms Shobbrook told her "that she needed to leave it and be careful as she could damage relationships and make things difficult with her colleagues. Later that afternoon Ms Shobbrook telephoned the Claimant about the chair assessment and during the conversation the Claimant told her that she had spoken to staff, who said they did not want to be used as a scapegoat and said that Ms Shobbrook had approached them, rather than them going to her. Ms Shobbrook then telephoned Ms Payne to apologise if she had been put in a difficult position and was told that the Claimant had attended her house to find out what had been said. On 5 or 6 June 2018 Ms Shobbrook spoke to Ms Thatcher who showed her the text messages sent between her and the Claimant on 25 May 2018.

56. On 11 June 2018 Ms Haines took a statement from Ms Payne. Ms Payne said that on 18 June 2018 she was discussing what had happened at the course with a colleague and it was suggested that someone spoke to Management. Whilst she was in reception, Ms Shobbrook came out of her office and asked how the training had gone and Ms Payne said it was a little fraught at times. At lunchtime, Ms Shobbrook approached her in the playground and asked what happened on the course. Ms Shobbrook informed Ms Payne that she would have an informal talk with the Claimant about her behaviour at the course and she would also be informed that her colleagues had raised concerns. During the evening of 25 May 2018, the Claimant attended her house and Ms Payne said "She was cross. I needed to explain exactly what I had said to ES. We also discussed the misunderstanding of how she approached Sara." Ms Payne said the situation was upsetting and she felt in a difficult position. She later confirmed that she did not feel badgered by management and had not felt forced to do anything. We accepted Ms Haines' evidence that, she was also told by Ms Payne that the Claimant had let herself into Ms Payne's house and had been shouting questions at her up the stairs, but that Ms Payne did not want this included in the statement for the school.

57. On 11 June 2018 Ms Haines took a statement from Ms Land, who said at some time after the course and before half term the Claimant asked her if senior management had approached her about the course. She also said that at some time before the course she had told the Claimant that it was a generic disability course and that the Claimant knew what was going to be delivered.

58. On 11 June 2018 Dr Pridham wrote to the Claimant [p188] in which she concluded that the Claimant met the diagnostic criteria for ADHD (predominantly inattentive type) and the nature of the difficulties fell into the mild range. The symptoms the Claimant had described were: a busyness in her head, she was easily distractible and easily side-tracked. Had difficulties setting priorities and sometimes organising herself, reported being irritated easily, like things done in a certain way and tended to get lost in daydreaming. It was identified that the Claimant needed to slow down, in that there were issues in her decision making that led to her making choices that were unwise. This was not provided to the Respondent at this stage.

59. On 13 June 2018 the Respondent was sent an Access to Work report following a meeting with the Claimant on 7 June 2018. [p195-200] in which it was identified that the Claimant's ADHD traits included short term memory problems, interrupting, difficulty managing stress. It was recorded that there had been disability training in the workplace and the Claimant was undergoing coping strategy training. It was recommended that there was disability awareness training in relation to fibromyalgia and ADHD and was for the Claimant, her close colleagues, managers and HR.

60. On 13 June 2018 the Claimant requested that the investigation meeting was postponed. It was rearranged and the Claimant was provided with new dates for the investigatory meeting and disciplinary hearing. Ms Haines rearranged both dates for the same reason as to why she arranged both dates originally. The investigation meeting was further rearranged to 12 July 2018.

61. On 15 June 2018 the Claimant commenced sick leave and had not returned to work by the time of the Employment Tribunal hearing.

62. On 3 July 2018 Ms Haines sent, to the Claimant, a list of questions she would be asking at the investigation interview, as a reasonable adjustment.

63. On 12 July 2018 the Claimant attended the investigatory meeting with Ms Haines [p293-305]. The Claimant was accompanied by a trade union representative. The Claimant said that her colleagues had told her they did not approach Ms Shobbrook to raise any concerns and she had asked Ms Shobbrook to speak to them about the trainer driving home. She denied that Ms Shobbrook had told her that her colleagues had raised concerns or that she had been asked not to discuss the matter with them. The Claimant said that she was not clear about what she was being accused of and had not seen any supporting evidence. We accepted Ms Haines evidence that she did not want to share the statements at that stage as it would form part of the disciplinary pack and she was concerned about further recrimination.

64. On 13 July 2018, the Claimant asked Ms Haines to approach the witnesses for further evidence, which she did. Ms Haines considered that there would be insufficient time for the Claimant to prepare for the disciplinary hearing and it was rearranged, after the Claimant had provided dates when her representative could attend. The first mutually convenient date was 20 September 2018 [p257].

65. On 27 July 2018 the Claimant raised a grievance against Mr Armstrong for withholding the investigation report [p253].

66. OH Assist provided a report dated 2 August 2018 to Ms Shobbrook, recording that the Claimant was off sick due to perceived work-related stress. It was identified that she had a number of underlying health conditions including fibromyalgia and ADHD, which were likely to continue and could flare up. They were considered likely to be a disability. In response to the School's question, OH Assist considered that the Claimant was fit to attend the disciplinary hearing and it was recommended that she had the details of the case in time to be able to study them. [p259]

67. When the disciplinary hearing date was moved to after the summer holiday Ms Haines decided, due to a heavy workload, that she would write the report during the holiday. On 10 August 2018 Ms Haines sent a draft investigation report to Ms Simmons, HR Manager of the First Respondent, for comments and then provided an amended report on 14 August 2018.

68. The Claimant received a copy of the investigation report on 7 September 2018. The report summarised the evidence obtained from Ms Shobbrook, Ms Payne, Ms Thatcher, Ms Land and the Claimant. It was concluded that the evidence confirmed concerns had been raised about the Claimant's behaviour. That the Claimant had then approached her colleagues after the conversation with Ms Shobbrook on 25 May 2018 about her conduct on the course. The Claimant had then quizzed her colleagues and had caused considerable distress. Annexed to the report were the statements of evidence and the interview with the Claimant.

69. On 20 September 2018, Mr Armstrong held the disciplinary hearing. The Claimant was represented by Tom Kennedy-Hughes, Unison Representative. Mr Kennedy-Hughes asked Ms Haines whether the Claimant's disabilities were considered as part of the investigation and was told that the Claimant had advised the school she had ADHD but had not presented any formal paperwork. The content of the conversation between Ms Shobbrook and the Claimant on 25 May 2018 was disputed. The Claimant said that the school had not followed up with support for her disabilities. The Claimant maintained that she was not aware of any complaints against her until she received a telephone call from Ms Shobbrook. During the hearing the Claimant provided Mr Armstrong with

Dr Pridham's letter dated 11 June 2018 and a copy was taken during one of the adjournments. In evidence, Mr Armstrong also confirmed that he had received copies of the Occupational Health reports. Ms Haines gave evidence that there was no reference in the investigation meeting that the Claimant put forward ADHD as mitigation and the Claimant said that she was not asked a question about this. The notes do not record that Mr Armstrong asked any questions about ADHD.

70. Mr Armstrong concluded, as set out in his letter dated 21 September 2018 that Ms Shobbrook had informed the Claimant about the concerns of her colleagues and that the Claimant had been told not to contact them. Further that the Claimant's colleagues were left feeling very awkward, upset, awful and harassed and that the Claimant "was having a go". It was taken into account that the Claimant wanted to engage with the school to amend her behaviour. The Claimant was issued with a formal written warning for unprofessional behaviour to expire on 20 September 2019 [p342]. It was concluded that the Claimant's conduct was a deliberate breach of a reasonable management instruction and the school code. Mr Armstrong considered that although the Claimant's behaviour at the training could be attributed to her ADHD, he did not consider that the behaviour following could be attributed to it. He also considered the hypothetical circumstance where the subsequent conduct was as a result of her ADHD and considered that a warning was still a proportionate and appropriate response to safeguard other staff members and ensure a safe working environment in which the parameters, as to what was and what was not acceptable, were clear. Mr Armstrong took into account the letter from Dr Pridham and noted that the diagnosis was mild ADHD (predominantly inattentive) and the symptoms listed and concluded that ADHD could not have been involved due to the length between when Claimant had spoken to Ms Shobbrook and the interactions with her colleagues. Further he had no questions to ask Dr Pridham because it was accurate in terms of the way that the school had experienced the Claimant in the past. It was also acknowledged that the whistleblowing policy did not apply, but the staff code of conduct and the ethos of the school did apply.

71. The Claimant, in her witness statement for the Tribunal, said that on 25 May 2018 she had met Ms Shobbrook at lunchtime and discussed the chair assessment. Following which she asked if Ms Shobbrook had spoken to the others about it being the wrong training and the trainer driving home. That afternoon she had spoken to Ms Thatcher and asked if she had spoken to Ms Shobbrook about it being the wrong training. She said after school she visited Ms Payne for a coffee because she wanted to talk to her about her father's recent diagnosis of terminal cancer and she was upset. Matters then turned to school and Ms Payne informed her that Ms Thatcher had told a colleague, Charlotte, that she had a go at her at school. The Claimant had to leave and sent a text to Ms Thatcher who responded quickly to her

messages and then that she said she was at hospital, so the Claimant stopped messaging. Afterwards, when at a friend's house, she had received a telephone call from Ms Shobbrook at which point she was made aware that her friends had complained about her. At that point Ms Thatcher reinitiated the text messages. The text messages [p175 to 175a] contradicted this account. At 1705 the Claimant sent a message to Ms Thatcher, who replied at 1934 and said she had just got back from hospital with her mother and ended by saying 'Have a good break'. She sent a message a minute later saying that she had told nobody that the Claimant had a go at her and the Claimant immediately asked further questions and was told twice by Ms Thatcher to, "just let lie" and "please just forget let it go".

72. The Claimant informed Dr Tyson in an interview for the medical report dated 13 November 2019, that when she spoke to Ms Shobbrook at lunchtime she 'categorically' did not discuss the training at all, nor was she informed that her colleagues had complained and she was not advised that she should not contact other colleagues. She then said that she went to Ms Payne's house for coffee to talk about her father's diagnosis and whilst having coffee, Ms Payne told the Claimant that it was suggested she had a go at one of the other attendees. She left and sent text messages to the other attendee and after that received a telephone call from Ms Shobbrook.

73. Mr Armstrong, in his witness statement, said that during the afternoon of 25 May 2018 Ms Shobbrook informed him that she had discussed the situation with the Claimant, who had asked who had reported her. Ms Shobbrook told Mr Armstrong that she had told the Claimant not to approach her colleagues and to leave the matter alone.

74. On the balance of probabilities, at lunchtime on 25 May 2018, Ms Shobbrook informed the Claimant that her colleagues had raised concerns about her and said that she should not contact them about it. The Claimant deliberately ignored that reasonable instruction. The Claimant's account in her witness statement and that given to Dr Tyson are inconsistent, in that she told Dr Tyson that there was categorically no discussion of the training with her. Further the evidence given by Ms Payne tended to support what Ms Shobbrook said, in that she was informed that Ms Shobbrook was going to have an informal conversation with the Claimant about the course and tell her that colleagues had raised concerns. Further Ms Payne's account contradicted the Claimant's account about what was discussed at her house. No reference was made to cancer and she stated that the Claimant was cross and she needed to explain exactly what she had said to Ms Shobbrook, this did not feature in the Claimant's explanations and it was unlikely that a friend of 30 years, who stated that she did not want to be involved, would create a false version of events. Further it also tended to show that the Claimant already knew that a concern had been raised hence

why she demanded to know what was said. Further support for this conclusion was provided in the oral evidence of Ms Haines, that the Claimant had let herself into Ms Payne's house and shouted questions at her up the stairs. We considered that Miss Payne was likely to have said that she did not want that aspect included in her statement. There was no evidence that the Claimant was upset, angry or stressed during the discussion with Ms Shobbrook and therefore, on the balance of probabilities the Claimant was calm at the time.

75. In relation to the reason why the Claimant attended Ms Payne's house, it is significant that Ms Payne made no mention of the Claimant's father's diagnosis or any other upset that the Claimant had, either in her statement or to Miss Haines on a confidential basis. What Ms Payne said to Ms Haines about the way the Claimant let herself into her home and fired questions at her, strongly suggests that the reason why the Claimant had gone to her home was to find out what she had said about her. It was more likely than not, that the Claimant attended Ms Payne's house in order to find out what had been said to Ms Shobbrook about her.

76. The Claimant appealed the decision on 28 September 2018 and her grounds of appeal included: (1) there had been a failure to follow procedures, (2) insufficient evidence to prove the allegations, (3) failure to provide a sanction within the disciplinary policy, and (4) failure to ensure reasonable adjustments were in place prior to the event and before and during the disciplinary hearing. Further the process should have been suspended whilst her grievance was heard. The Claimant provided a 48 page document setting out the basis of her appeal, in relation to reasonable adjustments she suggested that there had never been risk assessments carried out, in relation to the work coach she had not been permitted to have the sessions during the working day and that the disability awareness training was not the training that had been recommended. The Claimant was invited to attend an appeal hearing on 4 December 2018.

77. On 28 September 2018 the Claimant raised a grievance, which included complaints about the disciplinary procedure, in that her grievance was not heard before the disciplinary hearing, there had been a failure to provide disability awareness training and that the disciplinary process had not taken due regard of her disabilities. Her grievance was set out in a 46 page document. In relation to training the Claimant complained that the workplace coping strategies training should have been during work time and that the school had provided the wrong disability awareness training and there had been no risk assessments. In relation to suggested adjustments the Claimant said she should have regular sessions with a work coach for ADHD.

78. On 7 November 2018, the Claimant attended a grievance investigation meeting [p459] conducted by Ms Hudson and Ms Bateman, HR officer of the First Respondent. The Claimant was accompanied by a member of her trade union and the Respondent paid for Ms Anderson, Disabilities and Equalities Employment Officer to also accompany the Claimant. At that meeting the Claimant agreed that there were 7 points to her grievance: (1) the wrong disability awareness training had been put in place, (2) Mr Armstrong failed to supply sufficient information about the misconduct and failed to support allegations with facts, (3) withholding information was detrimental to her disciplinary case, (4) reasonable adjustments had not been made for her disabilities, (5) Mr Armstrong had failed to recognise her disabilities, (6) Mr Armstrong had asked her an inappropriate question at a work review, and (7) Mr Armstrong had allowed inappropriate statements to be made, specifically Ms Shobbrook asking questions in the playground.

79. After the meeting Ms Hudson considered a large number of documents including all of the Access to Work Reports, Occupational Health reports and ascertained a chronology of the steps that had been taken regarding reasonable adjustments [p471-473] Ms Hudson asked questions of Ms Shobbrook and Mr Armstrong. She prepared an investigation report [p527 to 537] considering the 7 aspects of the grievance and stated that the Claimant's requested outcome was for the disciplinary sanction to be removed. In relation to the first point of the grievance about the disability awareness training, Ms Hudson added that, the Claimant had not received appropriate training in her being able to manage her behaviour, which she alleged contributed to her inappropriate behaviour at the training.

80. At the disciplinary appeal hearing, on 4 December 2018, the Claimant was accompanied by a member of her trade union and a disability advocate. The panel was chaired by Ms Southwood. The Claimant provided a 48-page document about her appeal, which the panel read. The Claimant raised her concerns about the procedural matters of the disciplinary process, including that at the first meeting she did not know the case against her and the delays in providing the evidence to her. She also raised that Ms Payne had been spoken to in the playground. The Claimant said that it would have been a reasonable adjustment to see the work coach during working hours. She said that if the correct disability awareness training had been put in place the situation would not have escalated. She also said that she had asked for support and training for her behaviour. Mr Armstrong said that the Claimant was spoken to informally and told not to speak to anyone else. He considered that the subject matter of the disciplinary was serious misconduct. He accepted that senior management were aware of the disability awareness course content.

81. On 10 December 2018 the Claimant was informed that the decision of the disciplinary panel had been upheld and her appeal had been dismissed

[p514]. The panel considered all the evidence, including the documents provided by the Claimant. It was concluded that there was evidence that the Claimant's colleagues had been caused considerable distress and that it had been reasonably concluded it was serious misconduct. The panel was satisfied the Claimant had been advised not to discuss the training with her colleagues and she had chosen to ignore that advice. It was accepted that there had been some procedural flaws in terms of sending invitation letters for a disciplinary hearing at the same time as sending an invitation for an investigatory meeting. The panel was satisfied that ADHD had been fully considered by Mr Armstrong. The panel was also satisfied that the Claimant had known the case against her and had been given a reasonable time to consider the material for the disciplinary hearing. In cross-examination Ms Southwood said that she did not think there was ever a dispute that the training was not appropriate. Ms Southwood considered the impact of adjustments on the Claimant's ADHD and said that she felt strongly that it would not be a reasonable adjustment to ask staff members to feel bullied or harassed.

82. The Claimant attended a grievance hearing on 16 January 2019, chaired by Mr Culpin [p589]. The Claimant provided a 21 page document for consideration by the panel. At the start of the hearing the Claimant agreed that the 7 matters identified were her grievances. Items 2 (Mr Armstrong refusing to supply sufficient information about the allegations), 3 (Mr Armstrong withholding information) and 7 (Mr Armstrong permitting inappropriate comments to be made and Ms Shobbrook speaking to colleagues in the playground) had been dealt with in the disciplinary appeal. Discussion took place in relation to the remaining parts of the grievance.

83. The Claimant was provided with the outcome of her grievance by way of a letter dated 21 January 2019. [p597]. It was accepted that the training on 17 May 2018 was not what the Claimant understood Access to Work to have recommended; the Claimant expected it to relate to her disabilities of fibromyalgia and ADHD. There was no evidence that the school had deliberately booked the wrong training. The Access to Work report contained a recommendation for "Disability Awareness Support in the workplace" with a suggested supplier and a quotation was provided. The school business manager booked the training with the recommended supplier and used the quotation provided by Access to Work. The coping strategies training had been booked and the arrangements for the training were to be made between the Claimant and the trainer. This part of the grievance was not upheld. The complaint that reasonable adjustments had not been made was not upheld. It was found that Mr Armstrong had recognised her disabilities. It was found the school was informed of the Claimant's ADHD on 7 March 2017 and this aspect of the grievance was upheld. In relation to withdrawing the disciplinary sanction the decision was considered by the appeal panel on 4 December 2018 and that could not be dealt with under the grievance

process as there was no further right of appeal. It was recommended that up to date Occupational Health advice was taken in advance of the Claimant's return to work with consideration as to further reasonable adjustments. Further on her return to work the disability awareness training recommended in the June 2018 Access to Work report would be arranged and that the content of the course was to be discussed with her in advance.

84. The Claimant appealed the outcome of the grievance on 29 January 2019 [p610].

85. On 19 February 2019 Dr Pridham wrote a letter addressed to 'to whom it may concern', however this was not provided to the Respondents [p613].

86. The appeal was heard on 7 May 2019 and was chaired by Ms Probert, School Business Manager at an unrelated school. The Claimant was accompanied by an advocate. Adjustments were made to the meeting in the form of providing an appropriate chair, ensuring the temperature was correct and the provision of refreshments and breaks. At the start of the hearing the Claimant had prepared a lengthy statement for her representative to read at the appeal. Ms Probert found the statement and document references difficult to follow and asked the representative to stop reading and to address each issue separately, because she was unable to follow the statement. The hearing lasted 4 to 5 hours. During the hearing Mr Culpin said that the disability awareness training course, including its content was posted on the staffroom notice board and was clear that the contents were student disability based. The Claimant said that the trainer for the workplace coping strategies was only qualified to support her in relation to fibromyalgia [p636].

87. On 13 May 2019 the Claimant was sent the outcome of the grievance appeal [p661]. It was concluded that the disability awareness training was not what the Claimant thought had been booked, but this had not been deliberate. The more recent recommendation from Access to Work, had not been arranged because the Claimant was absent from work. The appeal was dismissed.

88. On 13 November 2019 Dr Carolyn Tyson, Clinical Psychologist, prepared a jointly instructed report on the Claimant. Dr Tyson was provided with the claim form, response, further and better particulars of claim, the response to those particulars and the case management orders. The Claimant attended a face to face assessment with Dr Tyson and there was a follow up telephone conversation. The Claimant had been undergoing therapy and in July and September 2019 had been trialled on medication. Dr Tyson considered the Claimant's therapy records of February 2019 and noted that the Claimant had identified her main difficulties as impulsivity, can have poor decision making, blurting out responses, interrupting others, having difficulty in staying quiet, speaking out of turn, struggling to focus and prioritise,

distractibility , impatience and having a quick temper. Dr Tyson considered that the Claimant suffered from ADHD and that she also had ongoing symptoms of pain and fatigue which were known to be reactive to stress. The Claimant's father was diagnosed with terminal cancer at the time of the relevant events. It was considered that the Claimant's reaction at the training on 17 May 2018 occurred as a consequence of her underlying ADHD.

89. Dr Tyson considered the Claimant's behaviour in contacting her colleagues and whether it was in consequence of her ADHD. The Claimant told Dr Tyson that she had gone to Ms Payne's home, in large part to discuss her father's diagnosis and was seeking support and in the course of the meeting it was suggested that another attendee had been unhappy with her and had then immediately texted Ms Thatcher. In Dr Tyson's opinion at paragraph 74 [p709u] "*The Claimant's self-reported immediate reaction in contacting the attendee by text on 25 May 2018 in response to receiving upsetting third party information was entirely consistent with her underlying diagnosis of ADHD (and, according to her, occurred in the absence of being specifically informed not to contact fellow attendees). The Claimant was likely to have been in a state of high arousal; she had been discussing stressful events and was then informed that someone had suggested she "had had a go at them*."""

90. Dr Tyson further said at paragraph 76 [p709u] "*In my opinion, the suggestion that the Claimant apparently engaged in impulsive-type behaviour sometime after the meeting of 25 May 2018 – that is after planning time – should not necessarily be regarded as being at odds with her underlying diagnosis of ADHD. Impulsivity is a dominant feature of ADHD, as is inattention and hyperactivity, but as stated above, the ADHD syndrome is complex, and is subject to a subtle interplay of personal traits and external stressors… According to the Claimant's report, she did react impulsively in response to being sufficiently emotionally aroused following the events of 17.05.2018 and then again on 25.05.18."*

91. Dr Tyson also considered whether the discrepancy between the accounts of Ms Shobbrook and the Claimant as to the content of what was discussed on 25 May 2018 with Ms Shobbrook. There was no suggestion that the Claimant was angry or upset at the meeting, nor that her behaviour was considered otherwise inappropriate at this time such that features of ADHD might prevail resulting in the Claimant becoming emotionally aroused and her concentration impaired. In Dr Tyson's opinion any discrepancy in the accounts, was not due to the Claimant's ADHD.

92. Dr Tyson considered whether if any workplace personal training had been given to the Claimant before the 17 May 2018 whether her responses would have been different. It was considered that the Claimant's behaviour at the training, the meeting and thereafter were likely to have been different, but

this was based on considerable supposition. "*If the Claimant had attended other events (such as training which she subsequently perceived to be incorrect or inappropriate), both she and the other attendees may have behaved differently*".

93. On 25 November 2019 Dr Tyson answered questions posed by the Respondents. She disagreed with Dr Pridham's assessment of the Claimant and in her opinion the Claimant's diagnosis of ADHD would be correctly categorised as Combined Presentation and moderate in severity. Dr Tyson accepted that the Claimant could have decided not to follow a direct instruction in respect of not contacting or speaking with other attendees.

94. In answer to questions from the Claimant on 25 November 2019, Dr Tyson was of the opinion that if Ms Shobbrook's account was correct the Claimant would have identified it as a direct and reasonable instruction not to contact her colleagues. We found that the Claimant was given the instruction and understood what it meant, but chose to ignore it.

The law

95. The claim alleged discrimination because of the Claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The Claimant complained that the Respondent had contravened a provision of part 5 (work) of the EqA. The Claimant alleged discrimination arising from a disability and a failure by the respondent to comply with its duty to make adjustments.

96. The protected characteristic relied upon was disability, as set out in section 6 and schedule 1 of the EqA. A person, P, has a disability if (s)he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.

97. As for the claim for discrimination arising from disability, under section 15 (1) of the EqA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Under section 15(20, this 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.

98. The provisions relating to the duty to make reasonable adjustments are found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that 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, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person. However, under paragraph 20(1)(b) of Schedule 8 of the EqA 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.

99. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

100. The remedies available to the tribunal are to be found in section 124 of the EqA. The tribunal may make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate; may order the respondent to pay compensation to the complainant (on a tortious measure, including injury to feelings); and make an appropriate recommendation. In addition, the tribunal may also award interest on any award pursuant to section 139 of the EqA.

101. The interest payable on discrimination awards is to be calculated in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ("the Interest Regulations"). Under regulation 2 the tribunal shall consider whether to award interest, and if it chooses to do so then under regulation 3 the interest is to be calculated as simple interest accruing from day to day. Under regulation 6 the interest on an award for injury to feelings is to be from the period beginning on the date of the act of discrimination complained of and ending on the day of calculation. All other sums are to be calculated for a period beginning with a mid-point date between the act of discrimination and ending on the day of calculation

Discrimination arising from disability

102. The proper approach to section 15 claims was considered by Simler P in the case of Pnaiser v NHS England [2016] IRLR 170, EAT, at paragraph 31: (a) Having identified the unfavourable treatment by A, the ET must determine what caused it, i.e. what the "something" was. The focus is on the reason in the mind of A; it involves an examination of the conscious or unconscious thought processes of A. It does not have to be the sole or main cause of the unfavourable treatment, but it must have a significant influence on it. (b) The ET must then consider whether it was something "arising in consequence of B's disability". The question is one of objective fact to be robustly assessed by the ET in each case. Furthermore: (c) It does not matter in precisely what order the two questions are addressed but, it is clear, each of the two questions must be addressed, (d) the expression "arising in consequence of" could describe a range of causal links … the causal link between the something that causes unfavourable treatment and the disability may include more than one link, and (e) the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

103. When considering a complaint under s. 15 of the Act, we had to consider whether the employee was "*treated unfavourably because of something arising in consequence of her disability*". There needed to have been, first, '*something*' which arose in consequence of the disability and, secondly, there needs to have been unfavourable treatment which was suffered because of that '*something*' (Basildon and Thurrock NHS-v-Weerasinghe UKEAT/0397/14). Although there needed to have been some causal connection between the '*something*' and the disability, it only needed to have been loose and there might be several links in the causative chain (Hall-v-Chief Constable of West Yorkshire Police UKEAT/0057/15 and iForce Ltd-v-Wood UKEAT/0167/18/DA). It need not have been the only reason for the treatment; it must have been a significant cause (Pnaiser-v-NHS England [2016] IRLR 170), but the statutory wording ('in consequence') imported a looser test than 'caused by' (Sheikholeslami-v-University of Edinburgh UKEATS/0014/17).

104. In IPC Media-v-Millar [2013] IRLR 707, the EAT stressed the need to focus upon the mind of the putative discriminator. Whether conscious or unconscious, the motive for the unfavourable treatment claim needed to have been "*something arising in consequence of*" the employee's disability.

105. No comparator was needed. '*Unfavourable*' treatment did not equate to '*less favourable treatment*' or '*detriment*'. It had to be measured objectively and required a tribunal to consider whether a claimant had been subjected to something that was adverse rather than something that was beneficial.

The test was not met simply because a claimant thought that the treatment could have been more advantageous (Williams-v-Trustees of Swansea University Pension and Assurance Scheme [2019] ICR 230, SC).

Justification

106. in assessing the legitimate aim defence, the tribunal must consider fully whether (i) there is a legitimate aim which the respondent is acting in pursuance of, and (ii) whether the treatment in question amounts to a proportionate means of achieving that aim (McCullough v ICI Plc [2008] IRLR 846).

107. In Hensman v Ministry of Defence UKEAT 0067/14/DM,Singh J held that when assessing proportionality, while and an Employment Tribunal must reach its own judgment, that must in turn be based upon a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer.

108. In addition, the defence of justification does not fail merely because there is a less discriminatory means of achieving the legitimate aim in question (Kapenova v Department of Health [2014] ICR 884). It is for the tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter (Hardys & Hansons Plc v Lax [2005] IRLR 726 CA).

109. The test of proportionality is an objective one. A helpful summary of the proper approach is provided in Bolton St Catherine's Academy v O'Brien UKEAT/0051/15/LA:

"[109] -… A leading authority on issues of justification and proportionality is Homer v Chief Constable of West Yorkshire Police [2012] IRLR 601 in which Lady Hale quoted extensively from the decision of Mummery LJ in R (Elias) v Secretary of State for Defence [2006] 1WLR 3213. Lady Hale cited a passage in his judgment when Mummery LJ said: "151 … The objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So, it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."

[110] "Mummery LJ went on to commend the three stage test for determining proportionality derived from De Freitas v Permanent Secretary of Ministry of Agriculture [1999] 1 AC 69 at p80 in the Privy Council (advice delivered by Lord Clyde): "165 - First, is the objective sufficiently important to justify

limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly are the means chosen no more than is necessary to accomplish the objective?""

[111] Lady Hale also made reference to the decision of the ECJ in Bilka-Kaufhaus GmbH v Weber von Hartz in which the ECJ held that a discriminatory practice might be regarded as objectively justified on economic grounds if a national court finds that the measures chosen by [the employer] respond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued, and are necessary to that end.

[112] Lady Hale cited a further passage from the judgment of Mummery LJ which he had cited from the decision of the Court of Appeal in Hardys & Hansons Plc v Lax:

> *[20] … As the Court of Appeal held in Hardys & Hansons Plc v Lax [31], [32] it is not enough that a reasonable employer might think the criterion justified. The tribunal has to weigh the real needs of the undertaking against the discriminatory effects of the requirement."*

110. Later in Bolton the EAT cited Pill LJ's comments in Homer v Chief Constable of West Yorkshire Police [2012] IRLR 601 at para 32 that the statute:

"…*requires the employer to show that … It must be objectively justifiable … And I accept that the word "necessary" used in Bilka … Is to be qualified by the word "reasonably" … The presence of the word "reasonably" reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal … Is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary*."

111. A tribunal will err if it fails to take into account the business considerations of the employer (see Hensman v Ministry of Defence) but the tribunal must make its own assessment on the basis of the evidence then before it.

112. In The City of Oxford Bus Services Ltd trading as Oxford Bus Company v Mr L Harvey UKEAT/0171/18/JOJ: (in the context of section 19(2) EqA) - when carrying out the requisite assessment there was a distinction between justifying the application of the rule to a particular

individual, and justifying the rule in the particular circumstances of the business (SC decisions of both Homer and Seldon applied). In the present case, the ET's focus had been on the application of the PCP to the claimant; it had failed to carry out the requisite assessment of that PCP in the circumstances of the business (see Hardys & Hansons plc v Lax [2005] ICR 1565 CA).

Reasonable adjustments

113. In relation to the claim under ss. 20 and 21 of the Act, we took into account the guidance in the case of Environment Agency v. Rowan [2008] IRLR 20 in relation to the correct manner that we should approach those sections. The Tribunal must identify

(i) the provision, criterion or practice applied by or on behalf of the employer; or
(ii) the physical feature of the premises occupied by the employer,
(iii) the identity of the non-disabled comparators (where appropriate); and
(iv) the nature and extent of the substantial disadvantage suffered by the claimant

before considering whether any proposed adjustment is reasonable.

114. It is necessary to consider whether the Respondent has failed to make a reasonable adjustment in applying the PCP and whether reasonable steps were taken to avoid the substantial disadvantage to which a disabled person is put by the application of the PCP (Secretary of State for Justice v Prospere UKEAT/0412/14/DA).

115. In relation to the second limb of the test, it has to be remembered that a Claimant needed to demonstrate that he or she is caused a substantial disadvantage when compared with those not disabled. It is not sufficient that the disadvantage is merely some disadvantage when viewed generally. It needs to be one which is substantial when viewed in comparison with persons who are not disabled and that test is an objective one (Copal Castings-v-Hinton [2005] UKEAT 0903/04).

116. Para 20(1) of Sch. 1 says that the employer will only come under the duty to make reasonable adjustments if it knows not just that the relevant person is disabled but also that his or her disability is likely to put him or her at a substantial disadvantage in comparison with non-disabled persons. Knowledge, in this regard, is not limited to actual knowledge but extends to constructive knowledge (i.e. what the employer ought reasonably to have known). In view of this, the EAT has held that a tribunal should approach this aspect of a reasonable adjustments claim by considering two questions:

(i) first, did the employer know both that the employee was disabled and that his or her disability was liable to disadvantage him or her

substantially?
(ii) if not, ought the employer to have known both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially? (Secretary of State for Work and Pensions v Alam [2010] ICR 665, EAT)

It is only if the answer to the second question is 'no' that the employer avoids the duty to make reasonable adjustments.

117. Ignorance itself is not a defence under this section. We have had to ask whether the Respondent knew or ought reasonably to have known that the Claimant was disabled. In relation to the second part of that test, we have had to consider whether, in light of Gallop-v-Newport City Council [2014] IRLR 211 and Donelien-v-Liberata UK Ltd [2018] IRLR 535, the employer could reasonably have been expected to have known of the disability. In that regard, we had to consider whether the Respondent ought reasonably to have asked more questions on the basis of what it already knew and we have had in mind Lady Smith's Judgment in the case of Alam-v-Department for Work and Pensions [2009] UKEAT/0242/09, paragraphs 15 – 20.

118. We also had regard to the EHRC Code of practice on employment paragraph 6, relating to the duty to make reasonable adjustments (2011), in particular paragraphs 6.19 and 6.21:

"*6.19. [Sch 8, para 20(1)(b)] 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*."

"*6.21. If an employer's agent or employee (such as an occupational health adviser, a HR officer or a recruitment agent) knows, in that capacity, of a worker's or applicant's or potential applicant's disability, the employer will not usually be able to claim that they do not know of the disability and that they therefore have no obligation to make a reasonable adjustment. Employers therefore need to ensure that where information about disabled people may come through different channels, there is a means – suitably confidential and subject to the disabled person's consent – for bringing that information together to make it easier for the employer to fulfil their duties under the Act.*"

119. Further, in terms of the adjustments themselves, it is necessary for them to have been both reasonable and to operate so as to avoid the disadvantage. There does not have to have be a certainty that the disadvantage would be removed or alleviated by the adjustment. A real prospect that it would have that effect would be sufficient (Romec-v-Rudham UKEAT/0067/07 and Leeds Teaching Hospital NHS Trust-v-Foster [2011] EqLR 1075).

120. Furthermore, the duty to make adjustments did not generally arise unless or until a claimant was able to return to work, although that is not always the case (Home Office-v-Collins [2005] EWCA Civ 598, NCH Scotland-v-McHugh [2006] UKEATS/0010/06 and London Underground Ltd-v-Vuoto [2009] UKEAT/0123/09, paragraphs 119-125). In Collins there was no evidence that the adjustments contended for would have aided the claimant's return to work whereas, in Vuoto a more positive view was expressed by OH in relation to the proposed changes and the claimant's likely consequent return. What they demonstrated is that, in all questions of this sort, the focus should always be upon the extent to which the adjustment was said to have overcome or alleviated the disadvantage suffered *at* work, assuming a likely return if the employee was actually absent.

Conclusions

Discrimination arising from disability

121. The 'something arising' from the Claimant's disability was the Claimant's behaviour arising from her ADHD and Fibromyalgia, namely that she could be impulsive and make poor decisions as a consequence, blurt out responses, interrupt others, have difficulty in staying quiet, spoke out of turn, struggled to focus and prioritise, could be distracted , was impatient and was easily irritated.

Was the imposition of a warning on 21 September 2018 and not retracting it unfavourable treatment?

122. In the list of issues and at the start of the hearing, the Claimant confirmed that the unfavourable treatment relied upon was the written warning was imposed on 21 September 2018 and not retracted at the disciplinary appeal hearing or the grievance or grievance appeal hearings. The imposition of a disciplinary sanction and not retracting is something adverse, rather than beneficial and was therefore unfavourable treatment.

Did the Claimant's behaviour arising from her ADHD and Fibromyalgia have a significant influence in causing the treatment?

123. We carefully considered paragraphs 74 and 76 of Dr Tyson's report. In relation to paragraph 74, the opinion was conditional on the Claimant's purpose of the visit being to discuss her father's cancer and that the discussion of it to have taken place first in order to put her in a high state of arousal. In the light of our findings of fact in relation to what took place at Ms Payne's home, the Claimant went with the intention of finding out what Ms Payne had said to Ms Shobbrook and did not start the conversation by discussing her father's cancer. The Claimant immediately quizzed Ms Payne about what she had said. Therefore, we found that the basis of Dr Tyson's opinion, namely that there had been a discussion about the Claimant's father's cancer which had put her in a heightened state of arousal before being told about Ms Thatcher, did not occur. With this stressor removed, we were not satisfied on the balance of probabilities that the Claimant's response was consistent with her underlying ADHD on the basis that she had attended Ms Payne's home to ascertain what she had said and that the contact with Ms Thatcher was a continuation of making those enquiries.

124. Paragraph 76, of Dr Tyson's report, was partly conditional on the Claimant's state of arousal, however 'planning time' was a relevant consideration as demonstrated by the words 'not necessarily'. Dr Tyson did not provide an opinion as to any likelihood, that even after planning time, the decision taken by the Claimant was caused by her ADHD and had specifically referred to impulsivity. There had been a delay of the whole afternoon before the Claimant attended Ms Payne's house and this was inconsistent with an impulsive reaction. We did not find that the Claimant acted impulsively when she attended Ms Payne's house and we were not satisfied that her ADHD was a factor in her attendance or what she discussed.

125. In Dr Tyson's opinion any discrepancy between the Claimant and Ms Shobbrook, about the conversation on 25 May 2018, was not due to the Claimant's underlying ADHD.

126. Mr Armstrong did not consider that ADHD was a factor in the Claimant's decision to approach the other attendees at the training. We were supported in this conclusion by Dr Tyson's report. The Claimant had been told by Ms Shobbrook not to contact her colleagues about what had been said about the training and would have understood the instruction as not to do so. There was no evidence that, during the conversation with Ms Shobbrook, the Claimant was upset or angry so that she would be in a state of arousal or her concentration would be impaired and therefore in the light of Dr Tyson's report the Claimant was not impaired by anything arising from her ADHD or fibromyalgia at that time. There was a significant break in time between that conversation and the Claimant going to Ms Payne's house and demanding what had been said. The Claimant's decision to attend Ms Payne's house was not impulsive and the purpose was to find out what had

been said about her. In the light of our findings of fact in relation to the purpose of the visit, the Claimant had not been put in a state of heightened arousal by reasons of her father's diagnosis and her subsequent actions in contacting Ms Thatcher were a continuation of her trying to find out what had been said to Ms Shobbrook. We were not satisfied that the Claimant's behaviour was related to her ADHD. The Claimant had deliberately ignored the reasonable management instruction of Ms Shobbrook and we were not satisfied that behaviour arising from the Claimant's ADHD or fibromyalgia was a significant influence on the decision to impose a disciplinary sanction. The same considerations applied during the disciplinary appeal.

127. In relation to the grievance, the appropriate process to remove the disciplinary sanction was via an appeal under the disciplinary process. The matters that related to the disciplinary process, raised in that grievance, such as the procedure followed and speaking to Ms Payne in the playground, were considered as part of the disciplinary appeal process, as could be seen from the appeal letter and disciplinary appeal hearing. The Claimant had deliberately ignored the reasonable management instruction. The reason why the grievance panel and grievance appeal panel did not retract the warning was because it had to be done under a different process. The Claimant's ADHD or Fibromyalgia were not part of this thought process and we were therefore not satisfied that something arising from her disabilities had a significant influence on that decision.

128. Accordingly, we were not satisfied that the Claimant was discriminated against for something arising from her disability.

129. Even if we were wrong, we considered that the Respondents had demonstrated their defence of justification.

<u>Were the Respondents able to show that it was a proportionate means of achieving a legitimate aim?</u>

The aim or business need?

130. The Respondents relied upon the need to ensure lawful management instructions were adhered to and that employees of the school were protected. The Claimant accepted that this was a legitimate aim. We agreed.

The reasonable necessity for the treatment?

131. The Claimant had already been approached by Ms Shobbrook and spoken to informally about what had happened at the training and specifically told her not to contact her colleagues. When she disobeyed that

instruction, she had ignored the earlier informal approach and it was therefore necessary to invoke a formal disciplinary process. If there were no consequences for failing to comply with reasonable instructions the authority of line managers would be undermined. It would also send out a message to employees that they did not have to do what they were reasonably asked, which would undermine the effectiveness of the management of the school. The Claimant accepted in closing submissions that all employees needed to feel protected and safe. It is important that an employee could raise genuine concerns about a colleague's behaviour with their employer and that they could do so without any fear of reprisal, otherwise such concerns might not be raised. This was particularly important in a school setting where, in addition to inter-staff relationships, there were potentially matters relating to the safeguarding of children. Further, in the school context it was important that a good example was set; the pupils would be expected to follow reasonable instructions given by the staff and therefore it is important that staff are also expected to follow reasonable instructions given by the senior leadership team. We therefore found that it was reasonably necessary to impose a warning.

Was it proportionate?

132. Mr Armstrong, although of the view that the behaviour was not related to ADHD, when considering sanction, considered the alternative that the behaviour was related to ADHD and was still of the opinion that a written warning was appropriate. We accepted the evidence of Ms Southwood that it would not be a reasonable adjustment to ask staff members to feel bullied or harassed. She considered that to overturn the warning would suggest that the behaviour was acceptable. The Claimant had ignored the reasonable instruction not to contact to her colleagues. It was a relevant consideration the Respondent did not take any action in relation to what occurred at the training, particularly as what occurred was in a different context in that the Claimant had become agitated. Whereas, the warning imposed related to the Claimant having ignored a reasonable instruction and her actions had caused distress to her colleagues. An informal approach to what had occurred at the training had not worked. The warning imposed was a written warning, however under the disciplinary policy stronger sanctions were available to the Respondent in terms of a final written warning or dismissal. Mr Armstrong imposed the lowest sanction that he could, taking into account the seriousness of what occurred. The decision was proportionate in all the circumstances.

133. Accordingly, we would have been satisfied that in the event the decision to impose a warning and to not retract it, arose from the Claimant's disability, it would have been a proportionate means of achieving a legitimate aim.

Reasonable Adjustments

Did the Respondents generally apply a provision, criteria and/or practice namely expecting a high level of politeness and/or high standard of behaviour at work as encapsulated by the School's Code of Conduct Policy which requires "consistent demonstration of high standards of behaviour"?

134. We found that the Respondents had applied the PCP. The Respondents argued that it was not applied generally on the basis that the Claimant would otherwise have been disciplined for what happened at the training and that it was considered on a case by case basis. Alternatively, it was argued that the decision not to discipline her was a reasonable adjustment to the PCP. The Second Respondent chose not to discipline her, as identified by Mr Armstrong because he thought it related to the Claimant's ADHD. The Respondents were only able to point to that single example where it did not commence disciplinary proceedings. We did not accept that a single departure from commencing disciplinary action was sufficient to show that the PCP was not applied generally. The Second Respondent chose to deal with what occurred at the training in the light of the Claimant's conditions. We concluded that the decision not to discipline the Claimant on that occasion was a reasonable adjustment to the Respondents requirements as to conduct by its employees. We were therefore satisfied that the PCP was established.

Did the PCP put the Claimant at a substantial disadvantage in comparison to with persons who are not disabled?

135. It was not disputed that the Claimant was or would have been put at a substantial disadvantage. The nature of the Claimant's ADHD means that she was prone to outbursts and impulsive behaviour. Therefore, the Claimant was more likely to be in breach of the PCP and therefore subject to disciplinary action and accordingly was at a substantial disadvantage.

Did the Respondents not know, or could they not be reasonably expected to know that the Claimant was likely to be placed at such a disadvantage?

136. The Senior Leadership Team when making the decision that formal action should not be taken against the Claimant in relation to what occurred at the training took into account the Claimant's medical conditions, which included ADHD. The school teaches children with special educational needs and caters for children with ADHD. The letter from Dr Pridham dated 11 June 2018 included that the Claimant reported being irritated easily and liked things done in a certain way and that it was advised that she needed to slow down, as there had been instances when she had made unwise decisions. We therefore concluded that the Respondent knew that the Claimant was

likely to be placed at the substantial disadvantage. Alternatively, it was apparent to the Second Respondent that the Claimant had been diagnosed with ADHD. Mr Armstrong relied solely on the letter from Dr Pridham and his own observations of the Claimant. By considering the nature of the Claimant's conditions, when deciding not to take a formal line after the incident at the training and the diagnosis of ADHD the Second Respondent was on notice that there might be a substantial disadvantage. Mr Armstrong did not take the opportunity to ask the Claimant questions about her condition or to seek further clarification from Dr Pridham. The Respondent ought to have made further enquiries. We would not have been satisfied that the Respondent could not have been reasonably expected to know that the Claimant was placed at the disadvantage.

Did the Respondents take such steps as were reasonable to avoid the disadvantage?

137. An adjustment not only has to be reasonable, but it must operate so to avoid the disadvantage of the PCP. The Respondent considered the Claimant's compliance in relation to the Code of Conduct when it decided not to take formal action in relation to what occurred at the training. Rather than operating a blanket policy it considered whether it would be appropriate to initiate formal action taking into account the Claimant's conditions. The Respondent decided that an informal approach was more suitable.

138. The appropriate adjustment in this case was to consider whether any behaviour falling short of the expected standard was attributable to the Claimant's disability and if so whether the circumstances of the particular incident would justify not taking disciplinary action. In the circumstances of this case the Second Respondent considered what occurred at the training and taking into account the Claimant's conditions did not subject her to formal disciplinary proceedings and therefore had put into place this adjustment.

Did the Respondents fail to make a reasonable adjustment by imposing the written warning or by not retracting it?

139. The Claimant had ignored a reasonable management sanction in circumstances which were not related to her disability and therefore it was appropriate to impose a disciplinary sanction. Alternatively, it would not have been reasonable to impose no sanction or to remove it at the appeal or grievance stage. The Claimant had chosen to ignore a reasonable management instruction, after an informal approach had been taken. The Claimant's actions had caused her colleagues distress. There is a need to maintain discipline and part of that maintenance is that employees know that there will be consequences if it is not maintained, particularly after

deliberately choosing not to follow a reasonable instruction. To impose no sanction in such circumstances would have endorsed the behaviour of the Claimant and it would not have had a deterrent effect for the future. The Second Respondent chose a low-end sanction, when it had other options at its disposal. The reasons detailed above in relation to justification in the discrimination arising for disability are repeated.

140. In the circumstances it would not have been a reasonable adjustment to impose no sanction or to remove it at the appeal stage or during the grievance process.

Did the Respondents fail to make a reasonable adjustment by failing to provide the recommended training to the Claimant's colleagues and staff about her disabilities?

141. The PCP relied upon by the Claimant is the requirement for high standards of behaviour. The Claimant did not raise as an issue whether or not there was a provision, criterion or practice in relation to the provision of training or the attendance at such training. The substantial disadvantage to the Claimant in relation to the PCP related to her behaviour and not that of her colleagues. Providing training to the Claimant's colleagues would not avoid the disadvantage to the Claimant because it would not avoid the need for her to maintain a high standard of behaviour. Therefore, this would not have been a reasonable adjustment to the claimed PCP.

Would it have been a reasonable adjustment to provide the recommended workplace coping strategy training to the Claimant?

142. The PCP relied upon was the requirement for there to be a high standard of behaviour. The provision of training to the Claimant did not adjust the requirement for employees to have a high standard of behaviour and it would not therefore have been a reasonable adjustment to the PCP.

143. In any event the disciplinary action complained of related to the Claimant's deliberate failure to comply with a reasonable management instruction and, as detailed above, this decision by the Claimant was unrelated to her disability. Therefore, the proposed adjustment would not have avoided the need to impose a sanction.

Would it be a reasonable adjustment to have the correct training in the near future?

144. As said above, the provision of training would not adjust the requirement for employees to have a high standard of behaviour. In any event the Claimant remained absent from work at the date of the Employment Tribunal hearing and the Respondent intended to provide the correct training on the Claimant's return to work. The Claimant needs to

participate in the arrangement of the training and also to attend that training and it would therefore not be reasonable for that training to be arranged before her return to work.

Conclusion

145. The Respondents did not fail to make reasonable adjustments in this case.

Employment Judge Bax
Dated 7 January 2020