EMPLOYMENT TRIBUNALS

Claimant: **Mrs R Callow**

Respondent: **Aurum Academies Trust Limited (Washingborough Academy)**

Heard at: **Lincoln**

On: **Monday 20, Wednesday 22 and Thursday 23 November 2017**

Before: **Employment Judge P Britton**

Members: **Mr J Akhtar**
Mr M J Pavey

Representation
Claimant: **In Person assisted by her husband**
Respondent: **Mr M Magee of Counsel**

JUDGMENT

This claim of disability discrimination is dismissed in its entirety.

REASONS

Introduction

1. The claim (ET1 was presented to the Tribunal on 23 March 2017. It was prepared for the Claimant by herself, assisted by her husband. In it the Claimant set out how she was employed by the Aurum Academies Trust at Washingborough Academy ("the school") as a chef between 1 September 2015 and her resignation effective on 28 October 2016. She set out why she was to be seen as a disabled person by way of depression for the purposes of the Equality Act 2010 (the EQA). She set out allegations of discriminatory treatment by the Respondent,principally by the Headmaster of the school: Jason O'Rourke. They span the period from the first allegation of micromanagement in June 2016 through to the treatment of her second period of disability related sickness starting on 16 September, and thence with issues relating to her resignation and thereafter having been placed for the duration of her notice period on garden leave. The Claimant does not have the necessary two years qualifying service to bring a claim of constructive unfair dismissal pursuant to the provisions of the Employment Rights Act 1996, but s39 (2) (c) of the Equality Act 2010 (the EQA) can encompass such a claim if a sufficiently serious act of discrimination as defined between s13 and s27 of the Act , or a series of such acts culminating in a

"last straw" , such as to be repudiatory of the contract of employment, caused the resignation.

2. In due course a response (ET3) was presented to the Tribunal which gave non discriminatory explanations for the treatment from time to time of the Claimant. It was denied, if that be what the Claimant was seeking to allege, that the actions of the Respondent were repudiatory so as to mean the claim could claim constructive discriminatory unfair dismissal.

3. There was a first case management discussion before Employment Judge Hutchinson on 23 May 2017. He defined the issues as he understood them to be and we will come back to that. There was at that stage a fundamental first issue in that the Respondent did not accept that the Claimant was a disabled person for the purposes of the EQA; and so the Judge made the usual directions in that respect for the disclosure of GP notes and an impact statement by the Claimant; liberty for the Respondent to reply thereto; and if disability was not agreed that there should be an attended Preliminary Hearing to deal with that issue.

4. Taking matters forward between 3 and 5 August 2017 Employment Judge R Clark accordingly held that attended Preliminary Hearing; and for the reasons that he set out in detail, the reasons being published early in November but his judgment coming out immediately after the hearing, he held that the Claimant was a disabled person for the purposes of the EQA by reason of long standing clinical depression. The Respondent had in respect of the claims also applied for strike out and/or a deposit order. He refused both applications having, inter alia had regard to the bundle placed before him. So Judge Clark found that they were triable issues with more than a little reasonable prospect of success.

The issues

5. So he set out what were the issues. At this stage having additionally considered the bundle and statements which are before us, we are going to list them in some detail as it assists the fact finding and also enables us to make first observations: they are as follows:-

> 5.1 **Issue 1:** In or around June or July 2016 the micromanagement allegation. Essentially it is that whilst the Claimant was working in the kitchen with her catering assistant Karen Parker, and on a date now said to be in July, that into the kitchen came Mr O'Rourke who everybody in the school refers to as Jason. So henceforth we will call the Headmaster Jason. He had in tow with him an outside maintenance man. We gather he may have come to look at the lights. The Claimant stopped Jason and wanted to talk about getting in pest control. It doesn't seem to be in dispute from Jason who was busy, this being early in the working day at what is a nursery and primary school with some 300 pupils, that he may have said "look I can't micromanage an issue like this Becks. Sort it out for yourself but if you have a problem go and talk to Sarah": that is a reference to Sarah Chatterton who is the Administrative Manager of the school. A core issue of course would be as to whether or not he said this before or after the Claimant disclosed her disability. It is not in dispute that the Claimant first disclosed that she suffered from depression on 6 July 2016. So if this is said to be an act of disability discrimination it of course cannot be so if the incident occurred before 6 July 2016, and because the Respondent up to then lacked the knowledge. Even so the issue becomes first of all should Jason have made a reference to "micromanage" and second as to the tone in which he may have said it:

this is because the issue of tone looms large in this case for reasons we will come back to.

5.2 **Issue 2.** The next issue is something that did definitely happen on 6 July[1]. It is an agreed fact that the Claimant was then on the third day of a self-certified absence for depression. She had already been to her GP as to which cross reference the medical notes at Bp[2] 257. The Claimant wanted to come into school and confide in Jason and Sarah that she was a longstanding sufferer from depression. So she came into school on 6 July 2016 and she told them; the issue is whether or not she was categorically promised counselling. Shortly thereafter the school term ended on the 21st? This was followed by the summer holiday and the school being shut. In that respect there are no issues. There are some factual happenings however that we shall factor in when we come back to the chronology. As defined by EJ Clark[3] this is the failure to provide a reasonable adjustment to the Claimant as at 21 July 2016 and thus pursuant to s20-21 of the EQA.

5.3 From the start of the autumn term 2016 there are the following issues and we have been able to pinpoint the dates more accurately:-

5.3.1 **Issue 3**. 9 September 2016 the Claimant alleges "being excluded from a staff meeting" What this is about is that the Claimant never having attended a staff meeting before on that Friday early in the morning as the Friday staff meeting is at 8:15 in effect surprised Jason in the corridor outside the Headmaster's small study, and which is opposite the staff room, and announced to him that she was attending the staff meeting. Jason queried "why are you coming?" because the catering staff had never attended staff meetings: they were primarily for the teachers, although the caretaker would be present to deal with any health and safety issues. But having so queried, Jason did not stop the Claimant attending the staff meeting. There is in the letter before action written by Chattertons[4] (Bp 192) a suggestion that she had been the subject of demeaning remarks bullying and harassing treatment, this time by Jason in said staff meeting. But no evidence has been led by the Claimant on that allegation and therefore it is not an issue before us. So the issue confines itself to Jason's query in the corridor to the Claimant. It was witnessed by Emma Revell who gave evidence before us; and if to query why the Claimant was attending was not inappropriate, nevertheless was there something about his tone which was oppressive or demeaning.

5.3.2 **Issue 4**. On 15 September 2016 Jason with Sarah present held a meeting with the Claimant in Jason's office to discuss issues that in particular had come to light the following previous day when the Claimant was attending a catering trade fair. Suffice it to say that the school had run out of sufficient food stuffs to cater for the menu requirements of the children as had been ordered by their parents. The net result was all hands on deck including Jason resorting to peeling apples as part of the improvised feeding of the

[1] As first listed, it was not put sequentially because it was under a different label, but we are going to deal with issues chronologically in terms of fact finding.
[2] Bp= bundle page.
[3] See his published reasons Para 2.3.
[4] The solicitors then acting for the Claimant.

children. As to hot food, it was found that a standby, i.e. dried pasta was seriously under stocked; stocking is part of the Claimant's job. Sarah had to go to the local Coop and buy emergency supplies. And in the context there had come to light other shortcomings, not all at the door of the Claimant, in relation to the way that catering had been going since the start of term: Hence Jason's decision that they should have this meeting on the 15th. Clear from the evidence is that this was not a disciplinary meeting as the minutes taken by Sarah make plain (Bp 167-8). This was a problem solving meeting to address the shortcomings that had come to light and create an action plan to prevent a reoccurrence. Leaving aside the issue of whether there is any disability discriminatory element to it, to address what had occurred in this way cannot but be within the remit of a reasonable management particularly given the importance of providing lunch to these young children at school.

5.3.3. **Issue 5:** The gold award issue. The school takes a very active role in what is described as the healthy living agenda. It sits in the heart of agricultural England. It clearly has close links to the surrounding agricultural community. It has a close liaison with the Soil Association which is of course at the forefront of organic farming. The children engage in growing vegetables at school and in that context the school has won awards from the Soil Association over the years. There is also the opportunity to win an award from the Soil Association for excellence in healthy catering. To win would particularly be an accolade for the Claimant and Karen. So the school won the Gold Award. The only issue is this. Was the photographed presentation at school to the Claimant and Karen at lunchtime on Friday 16 September demeaning? And if so what's it got to do with her disability? Is it that the Claimant because of her vulnerability as a mentally disabled person had by now a perception that might indeed have been in the non clinical sense of that word to some extent paranoiac? Was she perceiving things which she might subjectively find were accusative ie the meeting on the fifteenth or demeaning, the presentation on the sixteenth, when they were nothing of the sort?

6. **Issue 6.** The sixth issue we are dealing with is the resignation of the Claimant on 28 September; and in the context of that because they were allowed in by Judge Clark we put into the chronology the two preceding happenstances in this case. Thus the Claimant following the gold award presentation on the Friday presented herself to her GP that night with an explanation of worsening symptoms of the depression for which she was already on the maximum dosage of Citalopram. The doctor decided that she should be issued with a "fit note"[5], initially for a period of 2 weeks, as being unable to work because of depression, In the experience of this Tribunal which is very experienced particularly in issues relating to the Equality Act and has undertaken between it many cases relating to disability discrimination including mental health related issues, as an observation it is invariably the case that once depression takes hold it can extend out as an absence for more than the initial period of the first fit note. Something also observed to us by learned Counsel. In the context of the Claimant going off sick we get in the issue of the unfortunate sequence, and it does play a part in terms of objectively assessing the

[5] What used to be referred to as a sick note.

mind, in that sense motivation, of Jason. We will provide more of our findings from the evidence on this topic now as it puts the latter events in context and explains the actions of Jason.

6.1 The Claimant's husband texted him on the Sunday, 18 September, that the Claimant would not be in from the Monday because of depression. Of course Jason's immediate priority was to sort out providing the pupils with food on the Monday.

6.2 It so happens that when he was discussing the emergency on the Monday in what is a tightly knit school community, he was informed that the Claimant had in fact been seen over the weekend out and about with her daughter at the local gala/derby at Carholme (see Face Book posting at Bp 174). A day or so later there was a Face Book entry of her and her mother out celebrating the latter's 60th birthday (Bp177).

6.3 Obviously Jason was puzzled as to why the Claimant should go off sick after what he thought was a happy event on the Friday. Conversely he was concerned for the Claimant's pastoral welfare; but on the other hand what was he to make of this local intelligence as to her activities over the weekend? How did it square given the disruption the late notice of her not coming in on the Monday had caused to the school? Thus we get the first letter (Bp 175) dated 21 September 2016 inviting the Claimant to come in to school for an informal discussion on the 28th. As a matter of fact, and we deal with it now, the Claimant was not being invited in under the formal parts of the Respondent's management for attendance procedure ("MAP") which is before us and in particular BP 61a. She was being invited in as the members themselves have pointed out on an agenda which meets best practice for the purposes of the ACAS code of practice. It was to explore the various aspects of her absence, how the school could help and importantly, and indeed vital in cases of this nature, the possibility of a referral to occupational health. In the experience of this Tribunal it is invariably the practice and indeed should be so that a reference to occupational health, absent complete lack of cooperation from an employee, should always be pursued having discussed the underlying reasons for the absence[6] and agreed upon the wording of the referral.

6.4 As it is on 26 September the Claimant e-mailed back (Bp178), albeit it was penned by her husband but the Respondent wouldn't have known that because it's actually in the name of the Claimant and issuing from her e-mail address. Essentially the e-mail just says "unable to attend" but makes reference to "seeing doctor on Friday. Thereafter be in touch". The e-mail does not say "I am unable to attend because I am too sick". Hence the second letter (Bp180) from the Respondent also dated 26 September reiterating the request to see her; making it plain that the agenda is as we have already said; not invoking the formal MAP; and indeed saying that Jason is prepared with Sarah, to meet the Claimant if necessary off site and that she can be accompanied by a companion. We have no doubt that if she had said can I bring my

[6] Unless by now the health issue is completely resolved.

husband along the Respondent via Jason would not have objected. As it is at that stage the Claimant resigned (Bp181) on the 27 September giving notice to expire on the 28 October. The letter gave no reason for the resignation. The Claimant thanked the Respondent for the opportunity to have worked at the school and wished the latter well. Thus where is the link between her disability and the resignation?

7. **Issue 7**. The last issue we are dealing with is the handling of that resignation. The letter of the Respondent (Bp182) in reply to the letter of resignation is dated 28 September. Thus in relation to that letter:

7.1 Was is it a repudiatory discriminatory act to put the Claimant on garden leave?

7.2 Whether there was in that context additionally or in the alternative discrimination by requesting that the Claimant not contact colleagues in school?

Labelling the claims in terms of the engagement of the provisions of the EQA

8. As made plain by EJ Clark[7] the claims are ones of direct discrimination pursuant to s13 of the EQA save for issue 2 which is failure to provide a reasonable adjustment pursuant to s20-21. There is no claim before us based upon Section 15 unfavourable treatment or harassment pursuant to Section 26; and of course there has been the extensive attended PH before EJ Clark.

9. Thus as to what we are dealing with as to direct discrimination s13(1) provides:

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

10. There is no actual comparator in this case. Thus the Claimant is as to a hypothetical comparator presumably contending[8] that a person employed as per her at the school not suffering from a mental health disability would not have been so treated.

11. As to s20 the Act provides:

S20 (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements

(3) The first requirement is a requirement, where a provision criterion or practice (" the PCP*") of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps*

[7] As per his judgment (Bp 57-58) but add in the reasons viz the reasonable adjustment claim.
[8] It is still not at all clear but applying the over riding objective we will work on that premise.

as it is reasonable to have to take to avoid the disadvantage[9]*…*

12. As to the burden of proof on both fronts put at its simplest if on the factual scenario there emerges a prima facie case then the burden switches to the Respondent thus to show viz s13 that no part of the treatment was because of the protected characteristic. As to s20, then if there was a duty to make reasonable adjustments and the tribunal has established on the evidence what was the adjustment required, then the Respondent must show that it was not reasonable to provide the adjustment.

Findings of Fact: credibility

13. Before doing so we have heard under oath from the following witnesses and in each case evidence in chief by way of a written statement apart from that of Karen Parker. Thus otherwise the Claimant; Jason; Sarah and lastly Emma. We heard first from the Claimant.

14. And then we heard from Karen Parker. Stopping there Karen Parker was asked to come at very late notice. The Claimant had been requesting a witness order for around 2 months[10] albeit it was only on the basis she thought that Karen could help. In the interests of justice we decided as she is still employed at the school that she should attend and principally because she might assist first on issue No 1 and then on the catering award issue. Well what did we make of Karen? She has now been employed at the school for twelve years. She is clearly very happy there. She had no issue with the presentation of the gold award on 15 September. She is in the photographs (Bp209-211) taken at the presentation standing beside the Claimant. Both are smiling and in one picture pupils can be seen congregating around them. So in that respect she doesn't assist the Claimant when we come back to that issue, and she didn't see the timing of the presentation at lunchtime rather that in a formal school assembly as in any way as demeaning or belittling the status of the award.

15. And as to micromanagement issue or indeed his management style in general and in particular to her and the Claimant, she was clear that Jason was never obnoxious, bullying, demeaning or domineering in his attitude. We use such descriptions as they appear in the Chatterton letter before action for the Claimant. The letter paints a picture of Jason as a consistent bully. As to whether or not Jason might have used the phrase micromanage when he visited the kitchen whether it be in June or July of 2016 she simply couldn't assist. It was so long ago. Nothing stands out in her mind. We found her honest, straightforward and compelling. And thus it is the first issue in a case where credibility and who is to be believed are at the forefront where the evidence of the Claimant starts to be undermined. And as to Jason's style, Karen 's evidence very much mirrors that of Emma Revell, who we also found to be an honest, credible witness, and who witnessed the discussion between the Claimant and Jason on the staff meeting issue on 9 September. So neither provides any support whatsoever for Claimant's portrayal of Jason.

16. Following Karen, we heard from Jason. And yet again we first focus on credibility. We appreciate that perhaps bringing her claim has been an ordeal for the Claimant and that she is still mentally unwell. We do not say that she has

[9] As the core issue in this case is what is the PCP if any relied upon by the Claimant, and even if there is one did it place her at a substantial disadvantage, there is no need to address the rest of the section unless the Claimant establishes that factual scenario.

[10] This application had not been placed before a judge.

come to this Tribunal intending to lie. She has a perception on events as is invariably the case with a party to litigation. The question is does it bear scrutiny on an objective analysis which is the function of an industrial jury such as this. Let's look at it.

17. The Claimant said very clearly in the Chatterton letter before action in her ET1 and before Employment Judge Hutchinson that the micromanagement issue happened in June. Well if it did it can't possibly engage as an issue of discrimination because the first disclosure of a health issue to the Respondent is at best 6 July[11]. Now before us the Claimant's moved it back. Is it as she says because having initially thought it was round about her birthday, 15th June, she has now realised it was later because of by e-mails she has read but not provided either to the Respondent for the purposes of discovery or any anytime during this Hearing? The problem there is the absence of the e-mails.

18. Second 6 July and the counselling. The problem is the Claimant contradicted herself. Her evidence was initially as per her pleading and her witness statement that on 6 July she was promised counselling by the Respondent and told categorically by Sarah on the seventh that she was going to get it. In her cross examination at the very onset she said that she had been told that **they would look into[12]** on 6 July. That is not the same thing as a categorical promise. And when she was cross examining Jason she went along the same theme. We think she is muddled on this issue. Contrast Jason: he was absolutely clear that they never promised because they couldn't. The school uses an external provider for matters of this nature namely Schools Advisory Service (SAS) which is an insurance based provider. So he would need to know if they would fund it or provide it. And then there is Sarah: a credible, consistent witness. She was adamant that she was delegated by Jason[13] the task of enquiring of SAS; and when she explained to SAS that they had an employee who had disclosed a longstanding clinical depression and was it possible to provide her with counselling, she was told categorically no. And turn to the insurance document itself which is now in the bundle before us and it couldn't be clearer. SAS has complete discretion as to whether it will provide such as wellbeing counselling. It acts in its own interests and it alone decides. Thus it would follow that the evidence of Sarah and Jason is backed up by the source data. Thus we have on the face of it the evidence of the Claimant which becomes contradictory in contrast with the consistency of the evidence for the relevant Respondent witnesses.

19. Then we come on to that the Claimant says that she would never ever go back and ask about such matters because she doesn't like to be "confronting". Well it may not be such as confronting but the Face Book entry (Bp156a) dated 31 August 2016 posted by the Claimant in relation to being asked by the Jason as to whether she would be prepared to cook a meal for the staff on the first day of the autumn term known as an inset day is sarcastic. Even if as per the GP entries she was stressed and taking anti-depressants, it did not stop her posting the entry. And it brings in the context. Jason was very proud of the Claimant's culinary abilities. They were already working on the gold catering award. Expectations were high and the Claimant liked to otherwise get herself involved in food issues to do with the school. It had for instance a cookery club. She suggested they might get in a herbologist who might give the children a chat in the context of healthy eating. And here is a Headmaster who is quite clear if one thinks about the micromanage issue, who wants to try and empower where he

[11] Bp154
[12] Our emphasis.
[13] Who as is now clear as with all Respondent witnesses we found credible and compelling.

can, members of staff and encourage them. So he had asked the Claimant if she wouldn't mind cooking a special meal for the teachers on the inset day as of course the pupils would not be in.Thus she could engage her culinary skills: Not at all consistent as alleged by the Claimant with a school now embarking via its Headmaster on a train of discriminatory treatment because the Claimant has announced her depression. And how does she reward this act of support?

> *"So my boss thinks it's a 'great way to start the new school term' by me cooking school staff lunch….*
> *Bah… Cos I don't have any planning to do!! No, not the chef.*
>
> Char su pork and a veggie chow main anyone?"

Jason was shown the entry[14] and was hurt. And albeit it has nothing to do with the disability issues it was hardly going to be conducive to trust in the relationship. And then we get the next credibility issue.

20. The Claimant had always put her case relating to 9 September on the basis that as we have already described it Jason's tone and the way he phrased his question to the Claimant in the corridor when she said she was coming to the staff meeting was demeaning. But when she was questioning Emma she went much further than that. She said that so upset was she that after that staff meeting she went to her kitchen in floods of tears where Emma hastened to support her. Now Emma before us looked astonished at this suggestion and she told us not only did it definitely not happen, but it couldn't have done because as soon as the staff meeting was over she had to rush away to her class of infants who had by now arrived and were assembled waiting for her . Why didn't the Claimant raise this evidence of her upset earlier? Is it gilding the lily? Given our previous findings by now as to credibility we are driven to conclude that it did not happen.

21. The Claimant says that she was called to a performance review meeting on 15 September post the school food emergency. She used that phrase again today. But she wasn't. It was as we have said the kind of meeting that regularly happens when matters of concern arise and need to be discussed: it falls squarely within management's right to manage. She says that before she went into the meeting she had "thought I had got away with it". She says that meeting was from the outset intimidating and confrontational because there was Jason sitting the other side of the desk, notebook in hand, side by side with him sat Sarah, similarly notebook in hand and she was obliged to sit opposite them. Thus because of her disability this was unnerving and implicitly, leaving aside what is the PCP, a failure to make a reasonable adjustment for her mental fragility in the context of the disability. But Jason and Sarah are clear: they did not sit alongside one another. Jason went further: he would never do that because he would see it as confrontation: So two consistent witnesses against one who is already undermined by our preceding findings as to credibility. It follows that we believe Jason and Sarah.

22. So those are the credibility issues. They inevitably have a knock on effect on our findings on the mainstream issues.

[14] Not we stress by the Claimant.

Residual findings of fact

23. Prior to 6 July the Claimant had never disclosed previously to the Respondent her disability. We will accept that it was something she was deeply embarrassed about and shared with only her closest friends and her husband; even her parents didn't know at that stage. In that year before she came to see Jason and Sarah she had been to her doctor at least once. We note that in the previous year in the August just into starting this job, the depression was there. We of course accept that coping with stressors such as a new job may exacerbate a mental health condition such as that suffered by the Claimant, but none of that can be laid at the door of the Respondent as the Claimant showed no inability to cope; indeed as is now clear she gave all outward signs of thriving in the job. And when she presented to her doctor on 4 July 2016 (Bp257) she was not blaming the school for her low mood. There were clearly also other stressors as she has admitted to the Tribunal. We don't need to venture into them and therefore expose her privacy.

24. Against this background and having taken sickness absence on the advice of her GP, on the 6th she came into school that day because she wanted for the first time to explain how she was feeling. She told Jason and Sarah in a meeting with the door closed about her history of depression. Jason asked her whether or not there was anything specific about work which they should know in terms of it being a contributory factor. She said no. But Jason having himself seen within his extended family depression wanted to know if it might help if he could see if the school via SAS could provide some counselling. And he said that the school would investigate: and we have now dealt of course with that SAS would not help. The school, cash strapped as with most state institutions, did not have funds it could use for the counselling; and of course otherwise the Claimant could explore help via the NHS i.e. such as CBT via Well Being whether she did or not is not an issue for this Tribunal..

25. The Claimant was back at work the next day. Sarah, who comes early into the kitchen on a daily basis with her jacket potato for it to be baked for her for lunch, hugged the Claimant and congratulated on her being brave in disclosing her disability the day before, but then commiserated because SAS had confirmed that they would not cover counselling. So does that mean, which is now the remains of that issue under reasonable adjustment, that the Respondent is somehow obliged to nevertheless provide counselling? It is a non issue because the Claimant's issue has always been before the Tribunal that she was categorically promised counselling on the 6th which was confirmed by Sarah on the 7th. But it wasn't. It was the contrary. It therefore is the end of the issue.

26. Moving on, then there are no other issues left for that period. As we have already said there was nothing discriminatory about the micromanagement issue and first and foremost because the incident happened before the Respondent had any knowledge that the Claimant might have something that might constitute a disability. And in any event: all Jason was saying to the Claimant on a very busy morning was "issues about whether or not you need to bring in pest control are not for me, they are not things I should be micromanaging you on. Go and sort it yourself but if you need any help go and see Sarah". And what does the Claimant do? She does sort it herself. She has the necessary wit and strength of will at that stage to be able to go and sort out pest control. Finally from our findings already, we are not persuaded at all that Jason conducted himself in a bullying or otherwise inappropriate tone. Thus there are no issues left for that term.

27. Back to the staff meeting request on the 9th September. The Claimant announced in the corridor to Jason at about 8:10 am that she would be attending the staff meeting. Yes it took Jason by surprise. She had never been to one before. Why would she want to attend a school teachers' staff meeting? It's not something the catering staff would be expected or need to do. As it is we think maybe the Claimant wanted to get herself more involved in the life of the school. Perhaps she had resolved to do that over the summer holidays. Maybe it would make her feel better. But those are speculative points. What matters is that we have the evidence of Emma Revell. There was nothing demeaning at all about the way that Jason dealt with the issue. Yes he queried why she wanted to come, but he didn't stop her going and his tone was not hectoring or demeaning. So that is an end of that issue.

28. Leaving the school short of food on the 14th September when attending the trade fair. For reasons we have already gone to this was a serious shortcoming. The Claimant knew this . But as she told us:

"I thought I'd got away with it."

29 Of course she might have been taken aback by the, meeting on the 15th (see note of the same by SC at Bp167-8). She says she thought she was going to have a proper coffee and a fireside chat so to speak. It doesn't matter: it wasn't a disciplinary meeting. It was to discuss that which had come to light and how to make sure the school could avoid it happening in the future; and an action plan was drawn up which also involved Sarah. The issue of disability is irrelevant. Jason actually enquired of the Claimant as to whether there is anything about her disclosed health that might be relevant and the Claimant did not say there was. The impression that Jason and Sarah got was that the Claimant was simply being defensive about the issues of what had gone wrong at the school in terms of catering. And maybe she was because she had expected that it would just disappear ie that she had got away with it. So we have eliminated that issue. There is nothing about it that links to disability.

30. Gold award. Again we take this now short. The Headmaster was the first to congratulate the Claimant on being the winner, along of course with Karen as her assistant, of a catering Gold Award. He had been told by the Soil Association that they would give him the presentation plaque and the certificate when they came along for an arranged business meeting with him the following day. The meeting was scheduled for about 1:40pm straight after the school lunch and the Soil Association senior executives had a busy agenda for the morning. Jason far from being demeaning of the Claimant, insisted that she should along of course with Karen be presented personally with the plaque and the certificate by the Soil Association executives. Hence why it took place at lunchtime; and what better place to do it than in the canteen at the end of a busy lunch hour with lots of children in there still eating their meals etc. And the photographs speak for themselves. Happy smiling faces in terms of the Claimant, Karen and pupils. So why was it demeaning that it didn't take place in a full school assembly? Well the full school assembly on a Friday would be at about 2:15 when the parents come in. There isn't one in the morning. The Soil Association executives would have come and gone. The school can't dictate to them their movements; and therefore Jason saw a photographed presentation at the end of lunchtime as being the best way to recognise the achievement of the Claimant and Karen and ensure that it was not missed. And what's it got to do with disability? It's a perception

issue as Mr McGee has rightly identified[15]. It goes to the state of mind of the Claimant. But objectively it doesn't pass muster. There is nothing about the presentation that is discriminatory.

31. So we now come to the final issues. Jason had to decide what to do in the week commencing 19 September with the Claimant now going to be off sick for at least 2 weeks. The school uses an external legal/HR advisory service, Judicium Consulting Limited ("Judicium"). They are at arms length. Mr O'Rourke never does anything of moment relating to HR issues without consulting them. SC is not HR trained. Her role is primarily administration. We then factor in that the Respondent has a management for attendance policy (MAP). It provides a range of options as to what to do with absences. In this particular case the Claimant had actually exceeded the absence threshold for involvement of the MAP. She had about ten sickness days for a pre-arranged knee op; the 3 days for depression in July; and now ten days were certified as per the sick note. And although the Claimant may say the inception of the first informal, and indeed primarily pastoral phase was started too quickly via the letter of the 21 September, in the context of this case and the importance of the chef role it is not unreasonable that Jason as the head teacher decided having consulted Judicium wrote would write to the Claimant in the way we have just described, asking that they could meet. The Claimant's response was to e-mail as we have said before that she was "unable to attend". Albeit she made reference to seeing her doctor the coming Friday, she did not say "I'm too unwell to see you at the minute because of my depression

32. So Jason tried again to persuade her to agree to a meeting. The second letter sent on 26 September 2016 at Bp 181 at first blush troubled the Tribunal because of paragraph 2:

> *"…However you may be aware just because you are signed off as unfit for work it does not mean that you are too unwell to attend a short meeting."*[16]

33. But there was of course in the mind of Jason this question mark in terms of the Claimant having been at the Gala at the weekend and the other anecdotal reports to which we have referred. Prima facie if she was well enough to take her daughter to the Gala or her mother out to celebrate her 60th, then why could she not cope with a meeting on "neutral" territory to discuss how she was feeling and the way forward i.e. perhaps a referral to OH. And the rest of the second letter is as per the first. It is supportive; making plain the primarily pastoral purpose of the meeting and that it can be held away from school if necessary. Therefore looked at overall the Respondent via these letters in the context is about the first stages of exploring how to manage the absence. However the Claimant relies on the letter of her GP dated 8th October 2016 (Bp 181). At first blush inter alia he makes a valid point, having opined that the Respondent acted prematurely, he wrote:

"I would also question as to whether or not we had put a diagnosis of pneumonia down for the same time period, whether she would have been called in for a similar review."

34. The letter before action from Chatterton's dated 26 October 2016 (Bp192) referred to this letter being attached. But Jason is clear that he never saw it. The letter, which was received by the school on the 29 October was replied to on 3 November 2016 by the Chair of Governors, Steve Baker. This very detailed reply

[15] We were grateful for his fair and balanced written submissions.

[16] This is as per the MAP.

(Bp197-203), clearly written with the help of Judicium, makes no reference to the GP's letter. Thus maybe it was never attached. But all this misses the point. The Claimant was not being punished for being off sick. She wasn't being put down the formal route. She had not been reprimanded over the food shortcomings or the Face Book posting about the inset day meal. Everything points to a very supportive Respondent via Jason. The Respondent in wanting a meeting with the Claimant is about the first step in that potential process. The response of the Claimant to the second letter was to resign on the 27 September with notice expiring on the 28th October (Bp181).

35. Jason again consulted Judicium. Sarah then received the letter of response prepared by them . It was then simply topped and tailed and signed by Jason and issued on the 28 September (Bp182-3). By the reply, the Respondent accepted the resignation. Paragraph 2 read:

> " *I am writing to confirm acceptance of your resignation, which the Academy was very sorry to receive. However ,in light of your current ill health the Academy will not be requiring you to return to work and you will be placed on garden leave following the expiration of your current fit note on 3 October 2016. I hope this will allow you to focus on your health and recovery."*

36. Jason did not know that as the Claimant had resigned he could abridge the notice period and pay off the Claimant there and then with pay in lieu of notice. Garden leave off course means that the employment still continues to the end of the notice period. This in due course engages in that by the letter before action the Claimant via Chatterton's the Claimant sought to retract her notice. We will return to that. Jason followed as is to be expected the advice of Judicium. It is no criticism of the Respondent but we do think however that those who advise them perhaps give more thought to the context rather than using this sort of ten plate letter because the provision for garden leave wasn't really applicable. The Claimant wasn't doing a job where she needed to be tied in from such as competing by the holding of her to the notice period but putting her on garden leave and thus precluding her from the work place inter alia preserve such as confidential material or protect the business from such as potential sabotage[17]. This obviously was not the case. But having said that how can this issue relate to disability discrimination? The Claimant was signed off sick at this stage until circa 2 October. She has resigned. In her resignation letter; she hade not said she wanted to work out her notice period. Indeed she talks about returning all school equipment loaned to her "before this date". (Bp181).

37. So these are red herrings swimming in the issue, but we have dealt with them as the Claimant is unrepresented and the evidence has covered the forensic territory. However it is back to **Issue 7**: was it a repudiatory discriminatory act to put the Claimant on garden leave? It is of course misconceived. It cannot engage as a matter of law and because the Claimant has already resigned. Thus this letter cannot be a factor in her deciding to do so.

38. Finally as to the second limb of issue 7: whether there was in that context additionally or in the alternative direct discrimination pursuant to s13 of the EQA by requesting that the Claimant avoid contact? Again this was an unfortunate stipulation in the letter of the 28 September. Thus inter alia the third paragraph stated:

[17] The letter of course didn't say this but those are usually behind the rationale in imposing garden leave or indeed no contact to which next we come.

> *"Whilst on garden leave you will no longer be required to attend work unless specifically requested to do so. You should refrain from attending the Academy premises or contacting any of our pupils, members of staff, parents or associates of the school. We would also request that prior to your last day of work (this being the 28 October 2016) we would kindly request that you remove references to Washingborough Academy (and the Gold Catering Mark Award) from your social media accounts. You shall however remain employed by the School and should be available during working hours to deal with any related matters that may arise…""*

39. That was understandably hurtful to the Claimant. Why do it? The Claimant had, as is so obvious by and large served the school well until the last few weeks; she had been a popular chef and well regarded inter alia by the Head; parents and pupils. We have no evidence to the contrary. When this letter was written and then sent she remained in the employment and the Respondent knew sufficient, or should have with the professional support that it had, to have approached handling the Claimant on the basis she was disabled. And this is a s13 discrimination claim. In terms of the "treatment"[18] imposed by this letter read literally it not only prevented her from making contact in school but also outside it, and thus understandably this is what she thought. And of course the Claimant was at a very low ebb. This section of this letter is of course penned by Judicium and the Headmaster just accepted that which he was given to send out for the reasons we have given. But of course it doesn't mean that he should not apply his own mind to the context. Not articulated before us clearly in this respect but otherwise implicit for the preceding evidence would be Jason's unease with the Claimant's penchant for using Face Book with a lack of discretion in a way that certainly disrepute's him as the Head such as the inset day meal posting.

40. Nevertheless this is the first issue which survives to the second stage for this reason; this treatment: would it have been meted out to an employee working for the Respondent at the school who was not disabled by reason of ill health? For the sake of argument that is the hypothetical construct. We have no actual comparators and because the school had never faced having to cope with this or a similar scenario before. If such a person having for instance posted the Face Book entry; fallen down on the food issue; and then gone off sick with for example "stress" but been seen prima facia acting in a way seemingly incompatible with if not unable to work then certainly sufficiently able to attend an informal meeting but declined and then resigned; would that person have been treated any differently? That is of course the test[19] Thus on the burden of proof it passes to the Respondent as there is otherwise at least a possible inference to be drawn.

41. But from the evidence of Jason we can accept at least implicitly in terms of the letter drafted and the link to garden leave, that Judicium seems to have as a matter of practice linked garden leave with no contact for the duration. It may be over the top in terms of the school and the role the Claimant was providing, but it follows that because it would have been applied in such a situation to anybody resigning from a role such as the Claimant's in school, that therefore a hypothetical comparator would have been treated the same. None of the other

[18] Apropos s13.

[19] See Mayor and Burgesses of the London Borough of Lewisham v Malcolm 2008 IRLR 700 HL and which thus made in may instances utilisation of s13 difficult in cases of disability in particular in this type of scenario hence s15 of the EQA which is tailor made for the disabled albeit with a justification defence available to a Respondent.

evidence points to the Respondent having been other that pastoral and caring in its approach to the Claimant. There is no evidence at all that points to a discriminatory culture and particularly towards the disabled including mental ill health within the school or in the wider sense the Respondent. That is the argument that Mr McGee has made before us and he is at law correct. Thus this claim also falls. It might have been different had the Claimant deployed s15 of the EQA, but she did not.

Final Point

42. Nothing thereafter is relevant. An employer is entitled to accept the resignation of an employee unless obviously made in the heat of the moment in such as loss of temper. That does not apply here. The Claimant wanted to retract it by way of the letter before action from Chattertons written on 26 October: that is one day off the end of the notice period. And if it was posted, which appears to be the case, it would have been received after the notice period had run out. And that explains why in his reply to the letter on 3 November (Bp197-203) Mr Baker, as Chair of the Governors, makes plain inter alia that the employment has ended. Thus in any event having accepted the Claimant's resignation by its letter of the 28th September the Respondent is not at law obliged to reconsider that decision and re-affirm the contract. Thus it is a red herring: hence doubtless why although covered in the bundle it was not an issue to go forwards as per the issues as defined by Employment Judge Clark.

Conclusion

43. For the reasons we have now given the claims are dismissed in their entirety.

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Employment Judge P Britton

Date: 1 February 2018

JUDGMENT SENT TO THE PARTIES ON

05 February 2018

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FOR THE TRIBUNAL OFFICE