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EMPLOYMENT TRIBUNALS

Claimant: Mrs N Sarvananthan

Respondents: 1. Tapscott Learning Trust
2. London Borough of Newham

Heard at: East London Hearing Centre

On: 11-13 July & 17 July 2018 (Tribunal only)

Before: Employment Judge Prichard

Members: Ms M Long
Dr J Ukemenam

Representation

Claimant: In person

Respondents: Ms V Webb (Counsel instructed by D Moher, One Source Legal Services, Newham)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

- (1) The claimant was fairly dismissed. The claimant's claim of unfair dismissal fails and is dismissed.
- (2) The claimant's complaints of disability discrimination under section 15 and section 20 of the Equality Act 2010 fail and are dismissed.

REASONS

1 The claimant, Mrs Nalayini Sarvananthan, is currently 55 years of age. She lives in Ilford. For 15 years was Teaching Assistant at the Kensington Primary School in

Newham Manor Park. It was originally a directly maintained school but has since converted to academy status. In September 2017 it became Tapscott Multi Academy Trust / Learning Trust.

2 In the UK she qualified as a Teaching Assistant, and she joined the school in February 2002.

3 The role has changed over the years. The Kensington Primary School is currently growing to a 3 form entry for children from 5 to 11 years of age - Years 1 to 6. There are 630 children, 25 full-time equivalent teachers, and some 33 individual teaching assistants. There are 90 staff all told, including other non-teaching support staff.

4 First there is Nursery then Reception then Years 1 - 6. Reference to the early years foundation stage are to the reception in the nursery. A major distinction is Key Stage 1 consist of Years 1 and 2. Key Stage 2 is the Years 3 to 6.

5 We heard from 3 respondent witnesses. Ben Levinson is the school's Head Teacher, who had joined recently. Helen Harris is the Special Educational Needs Coordinator. She joined the school in January 2016. We also heard from one of the governors Ms Margaret Cameron-Ratchford, also a Trustee of the Multi Academy Trust. She has a background in housing. She heard the claimant's appeal against dismissal.

6 In February 2014, OFSTED had graded Kensington Primary as "Requires improvement" apparently the school was in the bottom 20% of schools in the country for Key Stage 2 results. The local authority Newham was extremely concerned, and had appointed an interim executive board.

7 The Head Teacher at the time, David Barker, left the school in July 2014. Another Head Teacher at a neighbouring primary school, Paul Harris from Kirwan Primary School, was asked to take over as Executive Head Teacher at that stage. He had that post for over a year.

8 In September 2015 Mr Levinson became the Head of School under Paul Harris who was still the substantive Head Teacher until October 2016. At that stage in April 2016 Mr Levinson became the Acting Head Teacher but in October he was confirmed in the post as the substantive Head Teacher for Kensington Primary.

9 This period was a success. In an OFSTED inspection at the end of the school year in 2016 school was graded "Outstanding". There had been a particularly high turnover of staff in that year.

10 Newham is well known to be a diverse borough. As a matter of classification it is a remarkable fact that the 100% of the children at the school, (literally all but one), are classified as having English as an additional language. We were told there is a significant number of mid-phase starters who have often arrived in the UK speaking no English at all. They all need to be absorbed. We were also told for instance that in 2016/17 school year 159 children joined the school of which 131 spoke no English on arrival.

11 The claimant's origins are from Sri Lanka and she was born there. We asked her, and her first language is Tamil. She herself is officially classified as EAL.

12 Another important background fact was the problem with the school budget. We were informed that the turnover of the school is £3.3m per annum. As well as poor previous academic performance it came to light only in November 2015 that there had been an over-spend on the school budget of £100,000. It was the school's duty to recoup that over-spend by making savings and economies in the next years. It would not be bailed out. The school's budget needs to be carefully balanced. For instance, considering that the turnover was 3.3m they have now returned the school to an under-spend which approximately equates to the claimant's annual gross salary of £16,464.

13 This under-spend appears in the budget proposal for academic year 2016/17. As a result of the overspend and the need to recoup it the school made a decision to end the engagement of 7 supply teaching assistants. That was on 1 December 2015, almost immediately after the overspend came to light because they were supply teaching assistants their engagements could be terminated instantly.

14 The claimant's situation at this time was complicated. When Mr Levinson came to the school the claimant was teaching year 4 that is Key Stage 2, as a Teaching Assistant. We were shown an old school timetable to confirm that this was so.

15 The claimant has what is agreed in these proceedings to be a disability. It is an unusual condition - Oro-mandibular Dystonia. It is a jaw condition which causes painful movements in the jaw, spasms and a general deviation of the jaw to the left hand side of the face. This results in difficulties with eating, and with speaking. These difficulties become more severe at times of stress. The claimant's speech sometimes becomes slurred and, at its worst, barely comprehensible. The claimant had a period off sick following this diagnosis. The condition only arose in 2010. She returned to work in April 2011. One of the features of the condition is it tends to get worse as the day wears on. She is better in the mornings than the afternoons.

16 She came to an arrangement with the school that she would work as a Teaching Assistant in the mornings but in the afternoon she could carry out administrative tasks as a Resource Assistant. That role involved preparing displays and other equipment for use by other teachers, saving them from preparation time. This arrangement continued for 4 years, until just before when the narrative leading to these proceedings starts.

17 We saw an occupational health report from 30 October 2014. This gives a helpful description of Oro-mandibular Dystonia. It confirms that there is nothing that the patient could do to stop the contraction symptoms. They are exacerbated by prolonged speech, fatigue, and exposure to the cold. At that stage the claimant had found some relief from having 3-monthly Botox injections in order to relax the muscles around the jaw.

18 At that stage, 30 October 2014, the advice was to continue with the administrative duties to exclude the claimant from classroom work and not to be asked to go into the playground during cold weather. The school had managed to

accommodate this.

19 Unfortunately the claimant then developed problems with the afternoon Resource Assistant administrative work because a considerable amount of it would involve lifting and handling of equipment. The next report we saw was 10 September 2015. The claimant reported as having sore shoulder and poor lordotic posture i.e. slight curvature of the back. She experienced stiffness. Her lumbar rotation was poor. Physiotherapy was recommended. The recommendation was that she should be asked not to lift anything more than 2 or 3 kilos. Unfortunately these restrictions on the claimant's duties was dictated by her disability, and other conditions.

20 The need to make these reasonable adjustments could not continue after the budget deficit came to light. When the 7 supply teaching assistants had to be released to make the necessary economies, the claimant and one other employed TA / Resource Assistant colleague, Adebose Olutangu, had to go back into the classroom to take up the slack.

21 We were shown the email by which the Head Teacher asked the school administrator, Shazidur Rahman, to released the 7 supply TA's. At that stage he talked to Ms Olutangu. She agreed she would go back into class. The same discussion happened with the claimant who accepted it, although she was not entirely easy or happy about the situation, given the history leading up to the restricted afternoon duties she was doing.

22 Effectively this was going to mean the total loss of 5 teaching assistants in the school and 2 Resource Assistants which was going to impose a strain on the teaching staff.

23 Rightly, the school obtained another occupational health report for the claimant soon after this decision. The claimant was critical the report was not obtained before she was put back in the classroom, but it was shortly after she was asked to go back into the classroom, on 18 March 2016. The report has been relied on by the respondent. To quote the summary and recommendations:

"Mrs Sarvananthan is fit to work with adjustments. She is currently at work but struggles with some of the duties specifically ones that require a lot of talking. This usually gets worse over the course of the day and there have been times when other people were having difficulty understanding what she was saying. I would recommend that she performs the duties which involve a lot of talking in the morning, and it would not be suitable for her to work with children with special educational needs. This can be supported by your own teaching assessment as the difficulty she has with speech are likely to affect the teaching and learning by the students. I also recommend she avoids outdoor duties especially during the winter as cold aggravates her symptoms ... A follow up appointment is not required."

The school reiterated that the conclusion of the report was that the Claimant was fit to work and that she was fit to do roles which even involve "a lot of talking" if they were in the morning.

24 Another area of the hearing that has been controversial was the respondent's alleged over-observation of the claimant. Apparently it has been a regular requirement even through the years when the school was performing badly for actual teaching staff to be observed and assessed in the classroom. It was apparently not a regular feature

for support staff, notably teaching assistants, to be observed in the same way. This requirement was introduced by Mr Levinson / Mr Harris as part of a general drive to improve the school standards. We have seen references to it in the school Head Teacher's report in the summer of 2016. Quaintly, teaching staff have been referred to there as "additional adults". The passages reads:

"All additional adults have been observed this term as part of their ongoing appraisal with targets set against the TA job description and linked to the teacher standards. All additional adults are currently receiving a mid-term review of their appraisal..."

We continue to have regular training by senior staff on key areas. Additional adults continue to attend PPA timed each week to plan with their year groups so they are clear on priorities and next steps."

25 Mr Levinson stated that all TA's and one-to-one support assistants receive ongoing support and development to help them improve their skills and knowledge and that all staff were part of the same process following the guidance set down by the local authority and agreed as part of the tripartite agreement with the unions. Thus the increased observations had some formally union recognised status.

26 It has been a leading contention of the claimant's throughout this process that there was no dedicated written procedure for the observation of teaching assistants. It is true. But the above quoted passage makes it clear that it is structurally linked to teacher standards. The difference is the targets are set by reference to the TA's job description. During the tribunal hearing we were shown the written classroom observations. The format of them indicates they were designed for observations of teachers. It seems that the process for the teaching assistants was structurally almost identical, down to the mid-year review, also quoted in the Head Teacher's report. That is what happened.

27 The tribunal has been shown many classroom observation records. They are recorded on a formal template. The majority of the claimant's were done by Ms Helen Harris, the SENCO.

28 The claimant was ultimately dismissed under a performance procedure. The reason put forward by the respondent for the claimant's dismissal is capability. It is worth citing from the Employment Rights Act 1996. Under section 98(2) a reason falls within this subsection if it –

"(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do [tribunal emphasis]."

It is worth reminding ourselves of the words in that sub-section because the claimant was appointed as a teaching assistant. That is what she trained for. Her job and role remained that of a teaching assistant, despite the previous *de facto* reasonable adjustments since 2010 that were made for her shoulder difficulties, but principally her oro-mandibular dystonia diagnosis.

29 Unfortunately the budget dictated that the claimant would have to return to the role for which she was appointed who could not afford the luxury of any Resource Assistants at all. The case of Adebose Olutangou illustrates that the claimant was by

no means singled out for special treatment in this regard because she had precisely the same treatment.

30 Even during this time of putting the claimant back into the classroom, some reasonable adjustments were made as follows. Firstly, the claimant was assigned, against her express wishes, to Key Stage 2 classes. We heard a lot of evidence on this. Ultimately we accepted the respondent's view. We asked Helen Harris and Ben Levinson closely about this. Their view was that, given the claimant's problems with speech in the afternoons, Key Stage 2 was less demanding than Key Stage 1.

31 Ms Harris said it was a "common misconception" that Key Stage 1 children would be easier to teach. Mr Levinson gave a helpful description that the younger children were more demanding in verbal interaction, demanding time and attention and less able to work independently. Key Stage 2 children could work independently and particularly in the afternoons when they tended to be working on projects that were more self-directed. In contrast, Key Stage 1 children needed the same level of support and input throughout the day. Similarly, the KS1 children became tired they needed more input in the afternoons. That evidence the tribunal accepts. It is possible that the claimant herself has the "common misconception" that it is the other way round. It is not quite clear what her reasoning was for saying that Key Stage 1 would have been easier than Key Stage 2. She never explained. We guessed it might have been that the KS1 children were less critical. It is possible that she was recalling a different time, maybe sometime back, when she had an easier experience with KS 1 children, possibly before 2010. We reiterate that when Mr Levinson first came to the school, the claimant was then teaching KS 2, Y4.

32 It became a theme of the classroom observations that some of the claimant's basic English grammar / syntax was wrong. Her English language, (quaintly referred to as "subject knowledge") was lacking. There were 3 focuses eventually:-

- 26.1 Not extending learning through questioning.
- 26.2 Not challenging children sufficiently.
- 26.3 Subject knowledge, spelling and grammar.

33 The respondent's later contentions were to the effect that these shortcomings would have been equally unacceptable in KS 1 or KS 2 so the whole question of whether the claimant had been forced to teach at a level which did not suit her did not arise in the respondent's logic. We accept that view. The claimant did not have any particular stated reasoning for her view.

34 There was a long string of classroom observations which we were shown throughout the period. The period was 13 months from the claimant's first observation from 29 February 2016 to 16 March 2017 when she was formally dismissed. There was a 13 month period with what seem to be 15 observations. We have been shown 13 of them, one of which is an observation with two dates, and one observation pro forma form is missing.

35 The first observation was by Helen Harris on 29 February 2016. There were criticisms here:- finding a word for a child rather than helping the child to find the word, dismiss was a verb and not adverb, as one of the children had said it. The claimant

was not sufficiently extending questioning from the set inference questions.

36 We accept Ms Harris' evidence that if a TA's observation is satisfactory that TA may not be observed again for another whole year. If it is not satisfactory the frequency increases considerably. The claimant's next observation took place on 15 March, again with Helen Harris. Again the claimant was criticised for not questioning the children or "challenging them". Examples were given on this occasion of ungrammatical statements made by the claimant - "didn't agree about what he said", "anyone want to explain look at this one lots of noise innit what's it mean loud noise". These were obviously ungrammatical. Concerns arose that if her own grammar was so apparently poor, she would not be able to correct the children's grammar or address errors they made.

37 The next observation followed on 28 April, again Helen Harris. Again failure to challenge children was observed and, again, grammatical errors. This seemed to be wrong word order "which word you didn't understand?" and "how much the population is increasing now?"

38 During this hearing the claimant understandably challenged Ms Harris in saying that her recollection was wrong and that she had misheard these things, and mis-recorded them.

39 Ms Harris was positive that she had quoted them *verbatim* accurately; she stated it was part of her training to record things accurately. She would never have recorded such things if they were not precisely what she had heard. That answer had certainty and assurance. We must accept that. No particular theory was put forward by the claimant as to why these were mis-recorded or to suggest that she might have been misconstrued.

40 The claimant's other point was that this rate of observation was stressing her out. If she had made mistakes it was a product of the stress she was put under. That is understandable. The tribunal has sympathy. It was obviously no fun at all having the issue assessed like this, particularly when she was unwell.

41 The next observation followed in just over a week, and again it was Helen Harris, on 6 May. The claimant was criticised for not challenging sufficiently, and not pitching the level right for the child in question. She made two spelling errors on the white board leaving the "t" out of "redraft" and spelling "handwriting" as 2 separate words and other ungrammatical statements like: "what this one?"

42 A concept Ms Harris used at this time was "scaffolding". This is to find methods of helping a child toward an answer rather than giving the child the answer. One of them is visual support. Another is framing a multiple choice. She told the tribunal about that.

43 At this stage, a month later, Helen Harris wrote a summary of the claimant's performance. There had been 4 observations at that stage and she met with her and formally typed up a set of targets. At this stage Ms Harris considered she had no choice but to move to the informal stage of Newham's capability procedure for school staff. Note that this is a generic policy and not just restricted to teachers. It provides:

"If an appraiser identifies through the appraisal process or via other sources of information that

the difficulties experienced by a teacher are such that if not rectified could lead to capability procedures, the appraiser, the head teacher, or a member of the leadership team will, as part of the appraisal process meet under section 9 of the appraisal policy (teacher experiencing difficulties).”

44 The claimant’s comments at that meeting were written down by Helen Harris but signed by the claimant on 6 June. She said:

“KS 2 I find difficult to work with. I have no experience and never worked with them before. Medical condition my doctor and occupational therapy gave me a letter to say I can’t work with children I find it difficult to talk. Also it is easy for me to work with KS 1 children I have the experience.”

45 In the tribunal’s view, having seen the timetable from 2014, that is demonstrably wrong factually. Further, the occupational health report (which the claimant was apparently referring to) had not said that she was not fit to work with KS2 children but had said: “Mrs Sarvanathan is fit to work with adjustments”. It envisaged her performing “duties which involved a lot of talking in the morning”.

46 Very shortly after this review meeting the claimant commenced a period of sick leave from 15 June until 26 July i.e. the end of Summer term. The school returned in September.

47 The claimant’s fit note in July contained the diagnosis Oro-mandibular Dystonia.

48 It is important to note, and we questioned all 3 witnesses very closely on this, how intelligible the claimant was in the classroom. It struck the tribunal that she frequently failed to make herself understood at this tribunal hearing. We asked all the respondent’s witnesses to compare the claimant in the classroom to how she was here at the tribunal. This tribunal always makes allowances for the fact that for anybody appearing, particularly representing themselves, this is a stressful experience. Even the claimant’s daughter who was a witness tended to support the view that it was stressful here.

49 The claimant’s intelligibility here varied throughout the day but also from day-to-day as well. She was struggling here. Mr Levinson and Ms Harris stated that they had not found any cause to comment on the claimant’s intelligibility with the children. These grammatical errors were a completely distinct subject and not affected by the claimant’s disability or her diction. On balance the tribunal has to accept that clear evidence. We would be surprised if some quite full and comprehensive observation records did not once mention the claimant’s intelligibility or slurred speech.

50 When the claimant was undergoing the formal capability process her stress levels rose and there was a contrast in her intelligibility. The person who dismissed the claimant and took the final capability hearing was Mr Levinson. He noted the contrast between how she was in that process and how she was when he himself had observed her in the classroom.

51 Ms Cameron-Ratchford of course did not know the claimant in the classroom or the school at all other than occasional walks as a governor through the school. It was something she was looking out for. She confirmed that the claimant had struggled to an

extent during her hearing. Her oro-mandibular disability seems to be directly related and proportional to the degree of her stress.

52 The claimant returned to work the following term in September 2016, and had a return to work meeting with Shaz Rahman, the School Business Manager. He asked the claimant how she was, and about the treatment she had had, and he found she had 32 days certified absence. He mentioned the importance of adjustments in the afternoon reiterating what the school already knew.

53 We were shown the rota of all the TA's. The claimant appears in the rota for mainstream KS 2 of the most demanding children. Special educational needs are to be found in HNF (higher needs funding - one-to-one children) KS's 1 and 2.

54 On 8 September there was an action plan. The key areas were identified as:-

44.1 challenge the children in their learning;

44.2 have "good subject knowledge" i.e. do not make grammatical and other English errors yourself.

There was a formal meeting between the Claimant and Helen Harris on that day.

55 The next observation was not by Helen Harris this time. She had asked for other teachers to share the load. It seemed to be a good policy, just in case, to see if there was any consensus across different teachers. Again negative comments. This was conducted by Mojisola Omole, Deputy Head Teacher. Points of criticism were:-

45.1 the Claimant's use of incorrect grammar;

45.2 not directing pupils to use fronted adverbials (e.g. consequently ...);

45.3 does not challenge pupils, just accepts what they say;

45.4 not able to move pupils on due to lack of knowledge / misconception

56 The claimant's next observation was a fortnight later on 12 October with Mr Levinson. He gave detailed comments but all echoing the same main headings that had been identified.

57 In the midst of this the claimant obtained and had a GP's letter sent to the school "To whom it may concern":-

"In my capacity as GP to the above named I can confirm Mrs N Sarvananthan suffers from Oro-mandibular Dystonia she is having treatment under the specialist in the hospital. This is worse at present and affects her speech which is not very clear.

Unfortunately this affects her work and she could not do the duties she has in the school. She would benefit from workplace adaptation which involves administration work rather than talking. I would be grateful if this could be taken into consideration."

58 The school did not action this. Whether that is a shortcoming on their part is an

issue we do not ultimately have to decide. Some employers might have taken the opportunity to obtain another occupational health report. Mr Levinson confirmed that the school receives many GP letters from staff about children. He was very aware, as the tribunal is, that GP letters are not truly impartial. GP's owe a duty to their own treated patients unlike the arms-length nature of an occupational health assessment.

59 The stipulation made by the GP was one that, for budgetary reasons, the school was simply not in a position to fulfil. It would have been involved breaches of budget and had been unfair on other staff.

60 Mr Levinson responded:

“Dear Nala

Regarding your letter from Dr Sarvananthan, whilst I am sympathetic towards the difficulty stated in the letter unfortunately we do not currently have any roles which involve administration and no talking.”

61 The claimant herself could have asked for an occupational health referral and, if she had asked, it would have been done. We heard about administrative roles in the school. There really are hardly any. There is a school secretary. There is a business manager who is used to dealing with accounts which was not one of the claimant's skills.

62 A role was advertised and filled later for a school receptionist. Everybody's view, including it seems the claimant herself, ultimately concluded this would not have been suitable role. A receptionist role obviously involves a lot of talking throughout the day, in fact particularly at the end of the day, when parents are there collecting children. There is a lot of telephone work, and general communication skills. If the claimant has any problems with intelligibility speaking face to face, those problems are multiplied speaking over the telephone.

63 The capability procedure moved on. By letter of 3 November the claimant was informed that the informal stage of the procedure had not shown the necessary improvement. She was therefore invited to a formal interview in November to initiate the formal stage of the Newham capability procedure. That was postponed twice which was fair enough. Ultimately the claimant was given a first written warning by Helen Harris. It says the written warning would be left on the file. The principal points of criticism were:-

- 52.1 not providing challenge in learning;
- 52.2 poor subject knowledge.

It stated:

“Therefore she is not able to carry out her duties and responsibilities as a Teaching Assistant”.

64 It was taken to the next stage. A second action plan was put into place on 22 November and the period was to be 22 November to 16 December 2016 (misdated 28 November). There was to be a monitoring period of 4 weeks.

65 On 21 November there was an observation by Helen Harris. Criticisms made were wrong grammar: "What you want write" and "When they pray to God they use [sic] to sing. The claimant answered questions for the children. On occasions she told the children exactly what to write, and it was incorrect. She did not challenge. She pitched questioning wrongly, asking a question which she should have known the child would answer, usually because they had answered it before. She had been tasked with 2 EAL pupils within year 4.

66 The next observation was on 6 December, by David Hope, Assistant Head Teacher. This was a reading lesson of year 4. Criticisms were that the claimant had failed to correct a child who said the wrong thing. She referred to a child as "what's your name?" rather than using the name.

67 The December observations were only 2 days apart; 6 December with David Hope, 12 December with Jaffar Raza, another Assistant Head Teacher. The criticism was that the claimant was not listening carefully to the children's responses before asking the next question, and she was pitching questions wrongly. The claimant needed to challenge and extend beyond simple statements to other statements e.g. why was she feeling sad, and to ask for clues as to why?

68 By letter of 16 December, just before the Christmas break, the claimant was invited to another formal meeting under the Newham capability procedure and at that meeting the claimant was given her third action plan by Helen Harris with the same emphasis. The monitoring was to be shared between Helen Davis, David Hope, Mojisola Omole and Jaffar Raza. The period of monitoring was to be from 10 January to 7 February. The claimant was at this stage under a final written warning from Helen Harris.

69 The next observation was on 17 and 18 January with David Hope. The same main criticisms not challenging, not extending, missing out the "t" in "nutrition", saying "balance" instead of "balanced" diet. At the time this was happening the claimant appears to have been attending English classes one-to-one. Notwithstanding that, she did not improve at the rate she needed to improve.

70 The next observation was 27 January, with Mojisola Omole. The claimant provided too many of the answers to the children, and was not extending their learning, not "modelling" properly, nor leading by example, and not pitching it right for some of the EAL children.

71 The next observation was 31 January, again year 4, with Jaffar Raza. Again the criticism was giving the children the answer rather than leading them and enabling them to find it.

72 The final observation was with Helen Harris on 8 February 2017. Examples given of poor grammar were:- "she wants go" "you want to go the carpet", "come and join with them", and not using question marks. It apparently resulted in children often being off-task, more often than not so.

73 There was a meeting on 20 February. Helen Harris said it was still not satisfactory and, in view of the previous warnings, the claimant would have to be

referred for a dismissal hearing on the grounds of incapability. By letter of 22 February the hearing was convened. Ben Levinson was to hear the dismissal case.

74 We saw an internal email confirming what Ms Harris' stance was. There was an email from Helen Harris to Ben Levinson which stated:

“Please find attached amendments. I have added about the impact of the action plans i.e. Michael improving Nala not. I think they need to see how much action we have taken and that it has positive outcomes but you might want to word it differently for that audience.”

This was a reference to the draft Head Teacher's report 2017.

75 Michael was a TA. His case is illustrative, by contrast with the claimant's. He had been observed over a period of one month and, as the email suggests, he had made the necessary improvements. We were told that his story ended well. He eventually took on extra responsibility as a TA lead on occupational therapies. He is still doing well at the school.

76 Whilst individuals perceive these capability procedures as inimical, as demotivating, and inevitably heading towards dismissal, the case of Michael shows this is not necessarily so.

77 It struck the tribunal, having looked at these observation records in considerable detail, that the mistakes the claimant was making in English grammar were basic. We can only think that for some 15 years at the school these errors had simply gone undetected and uncorrected. With classes of younger children it seems less likely that there would be a complaint.

78 The claimant contended that she was not given sufficient time to improve. However, set against that is the particularly important emphasis on children's learning and development. The claimant making these errors and the claimant's approach meant that children were missing out on important opportunities to develop and learn. This had to be balanced against the need to be fair to the claimant. The whole observation period was over 12 months, which is a long time in a primary school.

79 With the sort of budget pressures it had, the Head Teacher was rightly proud at the end that they managed to recoup the budget losses, losing 5 TA's, but still moved the school from "Requires improvement" to "Outstanding" in the space of 2 years. Unfortunately the claimant was not helping in this process.

80 It must be said that when Mr Harris and then Mr Levinson took over after Mr Barker had left, a number of staff found the sudden increase in pressure and emphasis on standards was too much for them, and they left. It was very much a new and necessary culture that was being introduced.

81 Finally, there was a capability meeting conducted by Mr Levinson Head Teacher. The claimant attended unrepresented but told the meeting she was prepared to proceed anyway. (We saw later when she had been represented at the appeal meeting it was really only moral support because the claimant had to do all the talking herself). The claimant had a GMB representative, but not at the final capability

meeting, the dismissal meeting.

82 The question of the claimant's difficulties with speech and her disability did not feature at this hearing. The claimant stated that the reason why she made mistakes when she did (as she admitted) was that she was very stressed and worried at the prospect of losing her job. That is why she went to get a doctor's letter. She stated that the stress was such that she had to resume quarterly Botox injections which she had not been having for some time prior to that. She again emphasised she really needed an administrative rather than a talking role. She seemed to acknowledge that the school no longer had these roles and needed everyone in the classroom.

83 The claimant seemed to suggest that her knowledge of English language was more of a handicap with KS 2 children. However, the school's position, as stated above, was that was not so. The tribunal agrees with the school on this, having seen how basic some of the claimant's mistakes were. Getting children into bad habits at a young age could do more damage, and be inconsistent with the input of other succeeding TA's and teachers.

84 The claimant stated at that final meeting that she was not given enough time. The quick succession of observations was putting too much pressure upon her. Her final position was that she wanted to work with KS 1 or undertake administrative work. It seems the final outcome was not a marginal decision for Mr Levinson. He felt he had no choice but to dismiss at that stage. A lot of time had passed with no evident progress at all in over 12 months. The same basic mistakes were still there at the end that were there in the beginning. He was keenly aware of the potential negative impact of her continuing in a TA role in the classroom, on the children. He had nowhere else to put the claimant.

85 Strictly speaking, legally, the claimant was redundant as an administrator. There was no administrative role for her. But the point is this was a capability dismissal by reference to her TA job. The claimant was always a TA even if *de facto* she was given administrative duties for a period to address a disability issue.

86 The claimant was informed of her dismissal by letter of 16 March. She was given 12 weeks pay in lieu of notice so she was not expected to attend work anymore.

87 The claimant appealed by letter of 26 March outside the time limit, but the respondent took no point on that and heard her appeal. The points she made was (1) KS 1; (2) the move from resources assistant back to the classroom (3) the GP's letter of 28 October, and (4) how she had cooperated with the process and attended and had had further training expanding her subject knowledge.

88 Her appeal was heard on 10 May 2017 by a panel of 3 school governors of differing backgrounds. The chair was Maggie Cameron-Ratchford, one the panel members was a disabled wheelchair user, another was a teacher.

89 Surprisingly on 28 April the claimant's GP wrote another letter "To whom it may concern" stating the diagnosis of Oro-mandibular Dystonia:

"This problem is worse since June 2016. As a teacher she could not speak as before and she

would like to continue her work in administration. She is under neurologist for regular treatment [Botox injection] from Jacqie Deeb who is a consultant clinical neurophysiologist.”

90 So far as the tribunal can see the appeal was a conspicuously sympathetic hearing. Ms Cameron-Ratchford impressed the tribunal as someone who was fully ready to see the claimant’s side of things. The claimant was represented by her GMB representative but the representative made very little contribution other than on points of pure procedure (of which there are not many of significance in this case). Perhaps the most potentially significant one (which we have already discounted above) is the fact that there is no dedicated support staff observation form template for TA’s. The school’s case was presented by the Head Teacher, as is normal. The person who decides on the dismissal presents the school’s case to the appeal panel.

91 After the hearing an informative outcome letter was sent to the claimant on 16 May written and signed by Ms Cameron-Ratchford:

“Governors noted that your responsibility included some work in the classroom throughout your time in school including the student stage 2 phase in KS 2, and from the view that you are not unfamiliar with the subject knowledge required. Whilst governors understood that the capability process is stressful, we were satisfied that the school has been as sensitive as was possible. Unfortunately despite your long service the school had no suitable alternative employment available.

Governors accepted that support plans have been in place for over 12 months and the desired improvement had not been reached. There was no reasonable prospect that the appropriate standards would be reached if further time and support were allowed.

Accordingly the panel upheld the original decision made by Mr Levinson to end your employment by reason of capability.”

This was a unanimous decision.

92 This leaves the tribunal with very few options under section 98(4) of the Employment Rights Act 1996. It was not a question of intelligibility and presentation. There was not a great deal for the claimant to say to challenge the fairness of this dismissal. The tribunal’s duty is not to substitute its opinion for that of the employer but to judge the employer by the well known “range of reasonable responses” test. Some decisions are harsh, some decisions are lenient. They can all be within that range, unless they are actually positively unreasonable.

93 The tribunal view the respondent’s approach to the claimant’s performance to have been at the lenient end of the spectrum. The length of time they were prepared to persevere and the amount of management time they invested in observing and recording observations, and holding meetings with the claimant, giving formal first warning, formal final warning and finally dismissal over that long observation period. Therefore the claimant was fairly dismissed and her claim for unfair dismissal has to fail and be dismissed.

94 On the last day of the tribunal hearing we urged the claimant to deal with her submissions on day 3 simply because it was clear to the tribunal that if she were given extra time to prepare her submissions and to present them on day 4 she would not have been in any better position. In fact she took some time 2 hours, on day 3 to

prepare a written submission, despite the tribunal urging her she was not to feel she had to compete with counsel, Ms Webb. Counsel invariably provides written submissions. That is the way they are. The claimant was told not to worry about the law. However, she did both.

95 The claimant's daughter who has attended throughout handwrote it. She was an impressive support for the claimant and an impressive young woman. The submission covered the law and was admirable. In a way it emphasises to the tribunal that if that submission could not help the claimant it was because her case was intrinsically not strong enough, and never was.

Disability Discrimination- s 15 EQA

96 The claimant makes a complaint under section 15 of the Equality Act 2010; that is unjustified discrimination because of something arising in consequence of disability. The short point here is that the school says that the claimant's problems, and those for which she was dismissed, did not arise from her disability. Intelligibility was not an issue in the classroom, not at all. That was the respondent's consistent evidence. We accept that evidence because we are quite sure if it had been an issue we would have seen some mention of it in those many observation records.

97 The claimant considers that the regime of quick fire observations was there because the respondent wanted to dismiss her. This case is testament to the fact that the respondent did not want to dismiss the claimant because many employers could reasonably have dismissed the claimant in a quarter of the time that the respondent took. Of course this was "unfavourable treatment" under s 15 but we accept it was not because of something arising from the claimant's disability and even if it had been it would have been justified.

98 We would have found that dismissal in this case was a proportionate means really the only ultimately proportionate means of achieving a legitimate aim which is extending children's learning, the raison d'être of the school. This is not a finely balanced matter. The contrast we have been told are that some TA's since Mr Levinson took over, 6 of them have actually started teacher training and are actively developing their careers in education and that is the sort of positive progression that Mr Levinson was trying to promote within the school.

S 20 EQA

99 There is also a complaint under s 20 of the Equality Act 2010. The provisions, criteria, or practices in question (PCP's) were identified as:-

- 79.1 The requirement to perform duties as a Teaching Assistant.
- 79.2 The requirements for routine observations during lessons.
- 79.3 The application of the teacher's appraisal policy to a non-teacher, the claimant TA.
- 79.4 The requirement to follow the action plan provided by Helen Harris.

79.5 The requirement to teach KS 2 instead of KS 1.

These were requirements and the respondent accepts that they were PCP's. They apparently did put the claimant at a substantial disadvantage (with the exception of 79.3).

100 It looks highly arguable that the claimant's deterioration in oro-mandibular dystonia actually predated the move back to the classroom in December 2015.

101 The respondent, in the tribunal's view rightly, argues that it was not the claimant's disability which put her at a substantial disadvantage for the purpose of s 20(3) EQA, in comparison to persons who are not disabled. It was her poor language skills, and not her fluency or comprehensibility at all. That alone is a reason for dismissing the s 20 reasonable adjustments claim

102 The other main issue we need to decide here is whether there were no reasonable adjustments in fact. The respondent had shown in the past, without regard to the budget, that reasonable adjustments could be and were made. In fact the claimant was virtually relieved of all classroom duties apart from cover duties as a TA, so she could mainly do administrative work. She then had restrictions there too, not being able to lift more than 2 or 3 kilos. The tribunal completely accepts that there was absolutely no administrative role for her any more than there was for her colleague Adebose Olutangu.

103 Taking the PCPs in order.

- (1) The claimant had to be a TA or nothing. She was not qualified for any other role within the school and that was her substantive role and the only role the respondent could now offer.
- (2) Routine observations were no more than was necessary when the claimant was in a failing situation and endangering the children's learning. Should the respondent have varied the process and the procedure? The procedure has a purpose which is to secure improved performance. We cannot think that a variation and lack of observation would have improved the situation.
- (3) The observation form template - the tribunal, as previously stated do not consider that there is anything in the point that the claimant was TA was under a teaching staff policy. It is a technical point of no real substantial merit or benefit to the claimant.
- (4) We cannot see that the requirement to follow the action plan shows a failure to make a reasonable adjustment. This action plan was, in the tribunal's view, far from being over the top. It was a simply focussed action plan concentrating on fundamentals together with illustrative examples. A good deal of support was put in place as part of the action plan including giving the claimant outside English language tuition.
- (5) KS 2 - the tribunal has already stated its rationale for accepting the claimant is simply wrong in her belief that she would have found KS 1 easier. It might possibly have exposed her inadequacies less. That is not the point in teaching. More damage can be done to a child's learning at the earlier stages. In a slimmed down staff group the deployment of TA's was crucial to pupil

achievement. That was the benchmark for the school and that is where we started. The school was originally in the bottom 20% of KS 2 schools in the country. It is now "Outstanding".

104 It is often said eg *Jones v Post Office* [2000] IRLR, 384, CA, that the legal test for whether an employer has made reasonable adjustments mirrors closely the range of reasonable responses test in an unfair dismissal case. That is another pointer. Where a dismissal is found to be fair, and not just marginally so, it is very unlikely that any tribunal will find that a respondent has failed to make reasonable adjustments for disability discrimination. The same word "reasonable" is the basis of both tests in section 20 EQA and section 98(4) ERA.

105 We found the claimant to be a well meaning and a committed TA and an extremely pleasant person during this hearing and we have a great deal of sympathy with her. She struggles in life. She has a lot on her plate, domestically and professionally. It is tragic that she has lost a job which she enjoyed for so many years. This is not the first time that rising standards in education will have caught some longstanding teaching staff and support staff out. We see several such cases in this tribunal. We wish the claimant well for the future.

Employment Judge Prichard

1 October 2018