THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH EMPLOYMENT TRIBUNAL**

BEFORE: **EMPLOYMENT JUDGE WEBSTER**
MS S DENGATE
MS M FOSTER-NORMAN

BETWEEN:

Ms K COULTON **Claimant**

AND

BEWBUSH COMMUNITY NURSERY

Respondent

ON: **19-22 February 2018**
18 June (In Chambers)

Appearances:

For the Claimant: **Dr Coulton (Claimant's father)**

For the Respondent: **Ms G Crew (Counsel)**

JUDGMENT

1. The claimant was disabled in relation to her conditions of OCD and anxiety. The tribunal was provided with insufficient evidence to conclude that she was disabled by reason of her learning difficulties.

2. The Claimant's claim that the respondent failed to make reasonable adjustments which placed her at a disadvantage because of her OCD and anxiety is partially upheld.

3. The Claimant's claim that she was victimised because she brought tribunal proceedings or threatened to take tribunal proceedings is not upheld.

4. The Claimant's claim that she was subjected to harassment related to her anxiety and OCD is partially upheld in that we find that the respondent's comments that she ought to stand on her own two feet as opposed to rely on her parents amounted to harassment related to her disability.

WRITTEN REASONS

The Claim

5. By an ET1 dated 20 June 2017 the claimant brought claims of failure to make reasonable adjustments, disability related harassment and victimisation. Those claims were then expanded upon by three documents dated 25 September 2017 titled:
   (i) Claimant's examples of harassment
   (ii) Claimant's examples of reasonable adjustments
   (iii) Claimant's examples of victimisation

6. By an ET3 dated 11 August 2017 the respondent refuted those claims. The respondent stated that they did not know that the claimant was disabled at the relevant time and had not subjected her to the treatment alleged related to her disability.

7. On 1 September 2017 a preliminary hearing established a list of issues which were confirmed and expanded on with the parties during this hearing (see below). Subsequent to that hearing and a production of medical evidence by the claimant, the respondent conceded that the claimant was disabled for the purposes of the Equality Act 2010 by reason of anxiety and obsessive compulsive disorder (OCD).

The Hearing

8. At the outset of the hearing whilst confirming the issues to be decided by the Tribunal, it became apparent that the claimant was also relying upon learning difficulties as part of her disability status. The respondent stated that this had

not been raised at the preliminary hearing nor was it addressed in the statement of disability produced.

9. On examining the documents the Tribunal found that the claimant had not referred to learning difficulties in her ET1 or the 3 additional documents (statements of harassment, reasonable adjustments and victimisation) submitted to the respondent and the tribunal on 25 September. However, it is clearly referenced and evidenced in the claimant's 'Statement of Disability' which was also submitted on 25 September. The tribunal therefore concluded, despite objections from the respondent, that it needed to consider whether the claimant was disabled for the purposes of the Equality Act 2010 and whether any of claimant's claims were made out in relation to this disability as well as those of anxiety or OCD.

10. The respondent was given the opportunity to consider whether it conceded disability regarding the learning difficulties. The respondent's representative helpfully took a pragmatic approach. It was conceded that the claimant had suffered from learning difficulties that, whilst she was at school, could have constituted a disability. However the respondent did not concede that she was disabled by this condition at the relevant time, nor did they concede that they had known that she suffered from that condition at the relevant time.

11. The tribunal heard from 5 witnesses; the claimant, Dr Coulton, Amanda Webb, Linda Godley and Emily Worsfold. All witnesses provided written witness statements and gave evidence in person to the tribunal.

12. The tribunal was provided with 2 lever arch bundles of documents. It was apparent at the beginning of the hearing that the claimant's representative was seeking to use a different bundle of documents. It was established that in fact he was using the same documents but differently ordered. The tribunal insisted that any document references were made to the same bundle and this was agreed.

13. By agreement the respondent handed up more documents on the second day which related to the claimant's learning difficulties which had previously not been part of the bundle.

14. The Issues were agreed with the parties at the outset of the hearing.

The Issues

Disability

15. Was the claimant a disabled person for the purposes of the Equality Act 2010 with regard to her condition of learning difficulties?

16. Was the respondent aware or ought reasonably to have been aware that the claimant was disabled by reason of any of the three conditions at the material time?

Failure to make reasonable adjustments contrary to sections 20 and 21 of the 2010 Act

17. Was there a provision, criterion or practice applied by the respondent namely:

    (i) Not to allow employees to be accompanied to meetings and
    (ii) Not to hold meetings with an employee's chosen companion after the employee had resigned

18. If the PCPs were applied by the respondent was the claimant placed at a substantial disadvantage in comparison to a person who was not disabled. The claimant says that she was disadvantaged because her condition means that she was unable to deal with meetings on her own.

19. If so would it have been a reasonable adjustment to:
    (i) Allow the claimant to be accompanied to the meetings and
    (ii) To hold a meeting with her chosen companion (her father) after she had resigned.
    (iii) Conducting the disciplinary, appeal or grievance meeting in a way which does not disadvantage or patronise me
    (iv) Explaining the significance and potential consequences of disciplinary hearings
    (v) Ensuring that the minutes of the disciplinary appeal or grievance meeting were properly recorded and a written copy of the minutes given to me as soon as possible after the meeting so that I was clear of the decision, what was expected of me in the future, and what action I was entitled to take after the meeting
    (vi) Ensuring that formal procedures were followed properly
    (vii) Disciplinary appeal and grievance meetings are documented with a fair degree of flexibility
    (viii) Sufficient notice given of disciplinary appeal and grievance meetings is given so that I am able to prepare in advance
    (ix) Full and detailed information of the disciplinary, appeal and grievance meetings is given in advance.

Victimisation

20. The protected act relied upon by the claimant was her ET1 dated 20 June 2017. During the hearing it became apparent that the claimant was also relying upon her threat to take legal action in the letter dated 24 May 2017. The respondent admitted that both are capable of being protected acts within the meaning of section 27(2).
21. Whether the respondent subjected the claimant to a detriment because she had done the protected act.

22. The detriments relied upon by the claimant are:
    (i) The allegedly unfair reference given to other nurseries namely Banana Moon, Daisy Chain and Tinies.
    (ii) The DBS referral on 15 June 2017.

Harassment contrary to section 26 of the 2010 Act

23. Whether the respondent engaged in unwanted conduct relating to the claimant's disability, The claimant says that the unwanted conduct was:
    (i) The manner in which the return to work meeting on the 16th March 2017 was conducted
    (ii) On an occasion the claimant was told in a very patronising manner that if she had flu she should be at home in bed.
    (iii) When the claimant has asked her father to help he she was told by the respondent that she was old enough to stand on her own two feet and not involve her father
    (iv) On the 24th May 2017 she was told off for using her mobile phone
    (v) Being told by the respondent at the appeal hearing that perhaps she should look for another job outside childcare since she was not very good with children
    (vi) On dates unknown the claimant says she was made to feel guilty when she asked to rearrange her shift so she could attend hospital for venesection.
    (vii) Not being allowed to take a full week's holiday during February or march 2017.
24. Whether the unwanted conduct had the purpose or effect of creating an intimidating hostile degrading humiliating or offensive for the claimant.

General observations

25. The claimant was a helpful and truthful witness. When asked questions she answered them in a straightforward way without trying to embellish matters. We concluded this largely because she answered questions which frequently contradicted what her father (also her representative) had said or was trying to suggest.

26. We found that the poor relationship between Dr Coulton and the respondent was pivotal to what had happened during the claimant's employment. We found that Dr Coulton whilst ostensibly trying to assist his daughter, who clearly required support, soured relationships between the claimant and the respondent because he thought he knew what the respondent ought to be doing and when. He appeared to feel entitled to tell his daughter's employer, with whom he had no direct relationship, how they ought to treat her but did not feel he needed to explain his involvement.

27. It was a running theme both during the hearing before this tribunal and his daughter's employment with the respondent that he made assumptions as to what people knew about his daughter's conditions, what the law was with regard to various policies and procedures and what his intentions were when getting in touch with the respondent on his daughter's behalf. Those assumptions were frequently wrong and damaging. At times the tribunal believed that this was more his case against the respondent than his daughter's.

Findings of fact

28. The claimant was employed as a childcare practitioner by the respondent from 6 April 2016 until 26 May 2017. The respondent is a Community Interest Company which provides childcare services for early years children aged between 3 months to 8 years old.

29. The claimant has been diagnosed with Obsessive Compulsive Disorder, Anxiety and various learning difficulties which were not specified. The respondent conceded that the claimant was disabled for the purposes of the Equality Act 2010 at the relevant time with regard to the OCD and Anxiety. They did not concede that she was disabled by reason of Learning Difficulties at the relevant time. The respondent stated that it was unaware of all the conditions relied upon at the relevant time.

30. During her employment the claimant was given a written warning for her sickness absence levels. As a result of the way this was handled the claimant looked for another job and was offered another role at a different nursery, subject to references. She resigned from her role with the respondent but the new job offer was subsequently rescinded after the respondent provided a reference to the potential new employer. The respondent refused to allow the claimant to continue working with them beyond her notice period.

31. During the claimant's notice period a child escaped from the nursery premises. Following an investigation the respondent concluded that the claimant was probably responsible for the child escaping and referred the claimant to the DBS.

Disability

32. When the claimant attended an interview for the respondent she accepts that she did not tell the respondent directly or in her application form that she suffered from any health conditions.

33. The claimant says that she told the respondent shortly after she started working for them that she suffered from anxiety and OCD. She says that she told them that she got anxious, that she took medication and that she liked to keep things clean. She says that she knows that she told them this because it was agreed that she could go out and take a 5 minutes break if she found herself getting too anxious. It was also agreed that her managers should tell her to just 'Stop and calm down' if she appeared to be getting anxious. The respondent witnesses agreed that this was what had happened.

34. The claimant also stated that a medical report was delivered, along with various other key documents, by her father, to the respondent shortly after she started work which gave significant detail or her various conditions. It was a report that was prepared for Ofsted and would have been submitted to Ofsted. The respondent witnesses stated that they knew that such reports were prepared and that they would all have had similar reports prepared about themselves but that they were sent to Ofsted and that they had not seen their own reports. They said that obtaining a copy of this report about staff members was not standard practice and was not necessary.

35. The respondent witnesses said that not only had it never received that report but that Dr Coulton was mistaken as to the timing of when he had delivered the documents as they were delivered shortly before the claimant had started work. There was significant disagreement over this issue. Neither party had any corroborating evidence one way or the other as to whether this document was delivered.

36. On balance, we find that the respondent did not receive this report. It had copies of all the other documents on its system. The tribunal accepts the witnesses' evidence that they did not have a scan of this one. The respondent witnesses gave candid evidence throughout the hearing concerning mistakes that they had made which do not place them in a good light. They were also in disagreement with each other over other key matters regarding what they knew and when about the health of the claimant and therefore we have no reason to doubt their evidence on this matter.

37. The tribunal does not accept that they deliberately destroyed this document because they had either read it and ignored it or had forgotten they had it and on receiving the tribunal claim panicked and destroyed it thinking it might absolve them. We think the most plausible explanation is that it was never provided to them as it is not one of the documents that they would have asked to see as part of the new starter process. If we are wrong and Dr Coulton did give it to them, then we find that it was not read and not stored in the claimant's file and we accept did not form part of their knowledge when they were managing the claimant.

38. Our finding regarding whether the report was given to the respondent is also informed by our findings on the timing of when the claimant's father says he gave in the report. We find that the documents that everyone agreed were handed in were given to the respondent shortly before the claimant's employment started not just afterwards as stated by Dr Coulton. We reach this conclusion because the employer would have needed these documents to carry out the relevant security checks on the claimant before she started work for them and the claimant conceded that they had probably been given in just before she started work as well.

39. Dr Coulton was as adamant about the timing of handing over the report as he was about the fact that he had given the report at all. We therefore find it more plausible than not that he was also mistaken about whether he gave the report to the respondent or not. There was no obligation on him to give the report and whilst he may have intended to we find that he did not.

40. All three respondent witnesses disputed that the claimant told them she had any medical issues. They say that they were aware she had told them she got anxious sometimes but that they offered her ways of coping with that particularly when her mother got sick. However they all said that they had no idea that this amounted to a medical condition.

41. Nonetheless, in evidence, Ms Godley agreed that she knew the claimant was on medication. She says that she did not know that the medication was linked to the anxiety but she also agrees that she did not ask the claimant about this. This was in contrast to the other respondent witnesses who maintained that they did not know she was on medication. We have no reason to doubt Ms Godley's evidence that she somehow knew the claimant was on medication and we accept that she did know that the claimant took medication.

42. Much was made by the claimant's representative that the respondent was under a duty to check whether the claimant was medically able to work for them and that their failure to do a proper medical check was in breach of those statutory obligations. We disagree. The evidence provided to the tribunal to indicate that the respondent was under such an obligation did not apply to organisations such as the respondent. Besides it was not in question that the claimant could carry out her job regardless of her conditions.

43. A letter was sent to the respondent by the local authority (pg 371) which stated that they had records confirming that the claimant suffered from anxiety and asking them to confirm what, if any, adjustments were being made for her.

44. The respondent witness conceded that she had misread the letter and thought that it said that the claimant had numerous conditions including dyslexia. Therefore when they asked the claimant about the letter they asked her whether she had dyslexia and a number of other conditions to which the claimant

understandably answered no. The respondent therefore noted that this issue had nothing to do with the claimant which was incorrect.

45. The claimant agrees that she did not tell the respondent about having learning difficulties. However she says that they ought to have known because she attended a local school that only took people with learning difficulties and because her qualifications came from there. However all three respondent witnesses denied knowing that the school only took children with learning difficulties and that they did not know that the claimant had had learning difficulties. We accept that they did not know that the school only took children with learning difficulties nor that they ought to have known about it. The claimant presented her qualifications and her previous work history and we see no reason as to why the respondent ought to have questioned how she obtained them.

46. The tribunal concludes that the claimant continues to have learning difficulties as referred to in the Learning Assessment Centre reports. From our limited knowledge of learning difficulties we are aware that they are unlikely to improve over time. No real detail was provided as to what the 'learning difficulties' were or how they impaired the claimant specifically. They stated that the claimant had a lower attainment and understanding levels than others her age but not what this actually meant in terms of her ability to function outside of school.

47. The tribunal was given very little information about the impact that these conditions had on the claimant's ability to carry out day to day activities at the relevant time i.e during her employment with the respondent as opposed to the impact they had on her ability to learn at school. All the claimant's evidence about her work life focussed on the anxiety and OCD.

48. The claimant's father sought to state that she was incapable of engaging with certain aspects of adult life such as banking, reading payslips and managing her own time. However, the claimant gave little or no evidence on these issues herself. The respondent stated that she worked well during her time with them including her record keeping and her ability to interact with staff and children. This was not disputed by the claimant or her father. The claimant agreed that she had managed to gain several qualifications and work since she left full time education. She was working at a pub at the time of the hearing and gave no evidence of experiencing difficulties with that job. She also gave no evidence of other aspects of life that she found difficult because of her learning difficulties in the disability impact statement or her witness statement. Further she gave no evidence that she agreed with her father's assessment of her ability to engage with adult life.

Sickness absence

49. It was not in dispute between the parties that the claimant was off sick with a stomach bug from 8 March 2017 until her return on 16 March 2017. She had

previously had various periods of absence of varying lengths which were all due to common ailments such as colds, stomach bugs etc. It was agreed by the parties that none of the conditions related to her anxiety, OCD or learning difficulties.

50. It was also not in dispute that on her return to work she was called into a meeting without notice and given a written warning for her sickness absence. The written warning was given because the claimant had had more than a certain number of days off in a certain period of time which automatically triggered the claimant's sickness absence policy and a written warning.

51. The claimant and her father, even at the tribunal hearing, maintained that she was disciplined because, amongst other things, the respondent did not believe that the claimant's absence was genuine. The tribunal disagrees. It is common practice for an employer to have a sickness absence process which has certain trigger points which can lead to disciplinary action regardless of the veracity of the ill health. This is clearly what happened in this situation. The sickness was also clearly unrelated to the claimant's various health conditions.

52. The respondent's witness Ms Webb said in evidence that the meeting had been a return to work meeting and not a disciplinary hearing and that therefore there was no need for them to give the claimant notice of the meeting or the right to be accompanied. She accepted that, in hindsight, the meeting should have followed a different process and that her actions were in breach of the respondent's own sickness absence process and return to work meetings. She said that she had been entirely unaware of that at the time she held the meeting. It was not in dispute that the respondent's policy in fact stated that the claimant ought to have been allowed to be accompanied at the meeting and the first stage ought to have been a meeting where the claimant was told that her absences were a concern and sympathetically managed. Ms Webb also accepted, in response to a question from the tribunal, that a meeting at which a disciplinary sanction was meted out, was inherently a disciplinary meeting.

53. Ms Webb maintained that the claimant had not been subjected to any disadvantage because of the failure to give notice or allow her to be accompanied because the claimant was well able to articulate her feelings about the situation and did so. The claimant's concerns were based around the fact that her absence was genuine and therefore ought not to have been disciplined. All of the respondent witnesses maintained that this meant that no adjustments would have changed that because any points made by the claimant or her father would have been about the genuine nature of her ill health and nothing else.

54. The claimant disputed this. The claimant's father gave evidence stating that had he been able to accompany her he would have pointed out that they were not following their own policy and that the first stage of the process should have

been that she was spoken to supportively about her absence levels and no sanction imposed.

55. We find that the respondent did act in breach of its own policies. It ought to have given the claimant notice of the meeting and it ought to have given her the right to be accompanied at that meeting. This was clearly a disciplinary meeting and the respondent knew that they were going to discipline the claimant before the meeting took place.

56. The claimant was informed of the outcome of the meeting and appealed against the outcome by letter dated 30 March 2017. An appeal meeting was held on 12 April 2017. It was not in dispute that the claimant was again not notified of this meeting in advance nor was she told about her right to be accompanied at the meeting. She was asked to attend the meeting on the same day that it occurred with no chance to prepare. The appeal meeting was again with Ms Webb. The respondent, again in breach of its own policies, did not refer the appeal to someone higher up in management to consider. Ms Webb conceded in evidence that it ought to have been referred to Ms Godley.

57. The respondent witnesses again stated that they felt it would have made no difference as the claimant had the opportunity to articulate what she felt was wrong with the written warning sanction and she expressed that adequately in the meeting. The claimant stated to the tribunal that had she been accompanied her father would have been able to point out the deficiencies in the process which she did not do.

58. During the claimant's employment, on various occasions particularly when she had been unwell, or when her father sought to get involved with her employment such as over her payslips, she alleges that that she was told to eat properly and to stand on her own two feet and that she found this patronising. She alleges that these comments were made in particular during the return to work meeting and the subsequent appeal.

59. We conclude that it was likely that the claimant was told on several occasions not to involve her parents to the extent that she was including around the issue of her payslips, her sickness absence reporting and the appeal against her written warning. We think it very plausible that the respondent felt that the claimant ought to take responsibility for her relationship with them including issues surrounding her pay and reporting in when she was not well. We find it likely that they told her in terms such as 'stand on your own two feet' particularly when they found Dr Coulton challenging to deal with. It was clear that Ms Worsfold and Dr Coulton disliked each other and no doubt this filtered down to how they spoke to the claimant about each other. We find that Ms Worsfold in particular was frustrated by Dr Coulton's involvement and that she perceived him as an overbearing parent as opposed to seeing his intention to support his

daughter and her need for at least some of that support. She dealt with that perception by telling the claimant to effectively look after herself.

60. The Respondent accepted that they did discuss the claimant's diet with her regarding her sickness absencees particularly when so many of them were stomach-related.

61. The respondent claimed that as the claimant had access to the disciplinary policy she ought to have raised her concerns about the process and had the opportunity to do so. However, given that the respondent witnesses themselves clearly did not know what was in the disciplinary policy and the correct process, we find it unreasonable of them to have expected the claimant to have done so.

62. The respondent upheld the decision to impose a written warning. As a result the claimant started looking for alternative work because she felt that the respondent operated unfair practices in giving disciplinary warnings for legitimate sickness absences.

63. The claimant stated that she felt that she was repeatedly picked on regarding the standard of her work. Although evidence was given that she was moved from the baby room due to some concerns, she was moved back into it prior to leaving and there was no evidence provided by the claimant that she was picked on as opposed to just managed. Other than being moved out of the baby room we were not given any examples of 'repeated' picking on nor the names of the members of staff she said treated her in this way. We therefore conclude that this did not occur.

Banana Moon Reference

64. The claimant, though an agency (Tinies) was offered a role by Banana Moon nursery subject to references. She accepted the offer and resigned from the respondent. The respondent then sent a reference which stated that the claimant had a written warning on her record. Banana Moon withdrew its job offer.

65. It was in dispute as to why Banana Moon withdrew their job offer. There was correspondence between the respondent and the agency which had placed the claimant with Banana Moon asking for a context for the reference. The respondent sought to assert that Banana Moon's concerns were about the claimant's performance overall and not the final written warning.

66. It was also in dispute as to whether the respondent had given a negative reference or whether it was a reasonable reference in the circumstances. We find that it was overall an average reference with nothing that would have raised significant alarm bells for a future employer save for the presence of a written warning. Whilst it is true that other areas indicated that the claimant could

improve we were provided with no evidence to suggest that such a reference without the written warning would have provoked a phone call much less the rescission of a job offer.

67. On 17 May 2017 the claimant had a meeting with the respondent to try and withdraw her resignation. The respondent refused to allow her stating that it was their policy not to allow people to return to work for them once they had resigned and worked their notice. The claimant disputed that this was their policy. We find that it was their policy as they gave unchallenged evidence that they had refused other employees reinstatement on several other occasions once they had resigned.

68. Dr Coulton wrote to the respondent on the same day (17 May) asking for a meeting to discuss the situation. In that letter he stated that the claimant had issues with anxiety and asked for a reasonable adjustment in that he wanted them to have a meeting with him. He specifically requested that they do not discuss the situation directly with the claimant. The respondent did not reply to this letter directly. They said that they did not respond because they did not feel it was appropriate to correspond with Dr Coulton without his daughter's knowledge. They had no independent relationship with Dr Coulton and did not know whether the claimant was aware of his request for a meeting. We accept that this was part of the reason they did not meet with Dr Coulton. We also believe that by this time Dr Coulton's interactions with the respondent whether direct or indirectly through the claimant, had by this time started to annoy the respondent considerably and they did not feel that they needed to explain their actions to him.

69. On 22 May 2017 the respondent wrote to the claimant confirming that her last day would be 26 May 2017 but confirming that the written warning would be withdrawn from her record. There is no explanation of why this happened in the letter. In evidence the respondent witnesses said that they had reviewed their processes in light of Dr Coulton's letter and realised that they had made a mistake. In evidence, which we accept, the respondent witnesses confirmed that they realised that they had acted in breach of their sickness absence and disciplinary policies and therefore that the claimant ought not to have had a written warning on her record. It was never explained to the tribunal why this revelation occurred at this point as opposed to when the claimant appealed but we believe it must have been because someone higher up in management realised what had happened. All subsequent references have not referred to a written warning.

Child escaping from nursery premises

70. On 23 May 2017 a child escaped from the nursery and was missing for quite some time. His absence was discovered by his family who found him in a local shop. The nursery only realised he was missing when his mother arrived to

collect him and told them that she had him with her already. An investigation into how this happened was immediately launched. The investigation unsurprisingly included speaking to all staff present that day.

71. Subsequently other matters were investigated namely, escape routes, sign out sheets and interview notes. On the day after the incident (24 May) the respondent asked the claimant to attend a meeting with Ms Worsfold and Ms Webb so that they could ask her more questions about the incident. The meeting was part of the wider investigation in which, the tribunal accepts, all members of staff were spoken to on at least one occasion and sometimes more. Before going to the meeting the claimant went to the toilet, just outside the nursery itself but still within the wider school/nursery building, and called her father to tell him that she was being called into a meeting. She appears to have told him that she was going into a disciplinary meeting.

72. The respondent expressly forbade employees using phones on shift. Ms Worsfold heard the claimant in the toilet using her phone and was angry. At the subsequent meeting which followed almost immediately after she was discovered using her phone, the claimant was told off for using her phone but no disciplinary sanction was imposed. We find that the claimant was however told by Ms Worsfold that it was normally a disciplinary matter and that the claimant using her phone in the middle of the child escaping crisis/investigation was the last thing that she needed to be dealing with (or something along those lines). It was clear from the evidence given by all parties that this was a fraught and emotional meeting.

73. Part way through the meeting Dr Coulton called the nursery and asked why the claimant had been taken into a meeting unaccompanied. Ms Webb took the call and tried to explain that it was not a disciplinary meeting but an investigation meeting. However it is clear that he was unpleasant during the call and that in the circumstances of the child going missing the previous day, this heightened emotion and accusatory stance surrounding the claimant's circumstances was not appreciated.

74. The tribunal finds it likely that voices were raised at the investigation meeting. We also find on balance that it is likely that the claimant was told not to involve her father in the situation and that his involvement was not helping matters. Given his apparent antipathy towards the respondent in his correspondence we find it more likely than not that he had been aggressive and rude during his call with Ms Webb and that this fed into the way the claimant was treated during the subsequent meeting.

75. After this the claimant went home. Dr Coulton wrote the following day to say that the claimant would not be returning to work for the respondent. It was clear in evidence that this was his decision not the claimant's. The claimant said that

her father had told her not to return to work. The letter went on to state that they would be taking the respondent to the tribunal.

76. Whilst it was only a passing comment in evidence by Emily Worsfold we believe it is worth noting in our judgment that we find when Dr Coulton delivered the letter to the respondent he handed it to Ms Worsfold and said '"you've been served". We find that this is indicative of how the relationship had deteriorated at this stage and how aggressive Dr Coulton had become towards the respondent. This is of note because we believe that Dr Coulton's role in the relationship between his daughter and her employer contributed significantly to its breakdown. By this stage the claimant's role had become somewhat overshadowed by her father's interference and anger at what he saw as his daughter being treated badly.

77. The Tribunal heard a huge amount of evidence from Ms Worsfold about the investigation that she did. Dr Coulton cross examined her for some time on this topic and challenged the reasonableness of the investigation.

78. We are not in a position to, nor is it necessary for the purposes of our findings today, to find out whether the claimant was responsible for the child's escape. Our only role is to decide whether the respondent's investigation was reasonable insofar as whether it was reasonable for the respondent to find in their report that the claimant was responsible for the child escaping and therefore whether it was reasonable for the claimant to be reported to the DBS in all the circumstances.

79. Overall we conclude that Ms Worsfold treated the situation with extreme importance and care. The investigation that we were presented with appeared thorough and reasonable. It is correct that there were other possible escape routes for the child as presented by Dr Coulton but they were highly unlikely and CCTV footage clearly showed the escaping child exiting the door behind another family. We accept the respondent witnesses' evidence that him getting to that outside door could only really have happened in one way. We find that on balance the investigation was reasonable in the circumstances and that given the seriousness of the incident we do not believe that the respondent took steps to undermine the security of its other children by deliberately framing the claimant.

80. We accept Ms Worsfold's evidence that she was provided with support and guidance during the investigation and subsequently by the LADO officer from the local authority. We accept that she was told by them that she had to refer her report and its conclusions to the DBS for them to satisfy themselves whether there were any wider child protection issues that needed considering regarding the claimant. We do not consider that she would have referred the

matter to DBS without being told to do so. The DBS duly found that there was no further case for the claimant to answer and no further action was taken.

Daisy Chain reference

81. The claimant applied for a role with Daisy Chain nurseries. This application took place between her receiving the respondent's letter stating that they were withdrawing the written warning and after she had been referred to the DBS. It is worth noting at this point that the respondent did not tell the claimant that she had been referred to DBS. The claimant was not aware of that referral until she submitted these proceedings. She therefore thought that in the absence of the written warning on her record she could apply for another nursery job.

82. The reference that the respondent supplied was a factual only reference. They chose to do this on the basis that they felt that if they were to give a fuller reference they would have to have disclosed the fact that they had referred her to the DBS. Ms Godley stated that another employee had been offered a job by Daisy Chain on the basis of a factual only reference so did not know why they had not offered the claimant a job on this occasion.

83. We accept that it is the industry norm in childcare to provide fuller references and it is possible that the failure to provide a full reference was the reason the claimant was not offered this job. However we also find that the reason a factual only reference was given was because of the child escaping and the situation with the DBS referral and the position this placed them in.

<u>The Law</u>

84. S 6 Equality Act 2010 Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

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

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability—

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

85. S 15 Equality Act 2010 Discrimination arising from disability

(1)A person (A) discriminates against a disabled person (B) if—

(a)A treats B unfavourably because of something arising in consequence of B's disability, and

(b)A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

86. S 20 Equality Act - Duty to make adjustments

(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 of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

87. S 21 Equality Act - Failure to comply with duty to make reasonable adjustments

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

88. **Schedule 8, Equality Act 2010** states that the duty to make reasonable adjustments arises unless the employer can show that it did not know or "could not reasonably be expected to know" that the employee is disabled or that there was a substantial disadvantage.

89. Case law and the EHRC Code suggest that knowledge will sometimes be imputed to the employer. The EHRC Code advises that employers must "do all they can reasonably be expected to do" to find out this information.

Conclusions

Disability

90. We were provided with significant evidence that the claimant had been diagnosed with learning difficulties at school and college. The evidence stated that it impacted on her cognitive abilities at school. We accept that it is unlikely that learning difficulties reduce with age and accept that she suffered from an impairment. However both the claimant and her father gave evidence of her educational achievements and it is clear that she holds down responsible jobs. We were given no information as to how the learning difficulties impacted on her ability to carry out day to day activities at the relevant time. Her father gave some evidence that she would have struggled to understand her payslip and the incorrect tax code however we do not find that this is sufficient to establish a significant negative impact on her ability to carry out day to day activities. All the other information given about her abilities was positive. We therefore conclude that we were not given sufficient information to conclude that the learning disabilities were capable of amounting to a disability for the purposes of the Equality Act.

91. It is not for the tribunal to extrapolate from an old medical report designed for educational purposes, what the current impact of a condition has on an adult's

ability to carry out day to day activities. Whilst we accept that we can on occasion make reasonable inferences, we did not feel that we had sufficient information on which to make those conclusions today without making huge assumptions regarding the claimant's cognitive abilities that could be both patronising and discriminatory in themselves. The claimant was given several opportunities during the hearing to establish what the impact of her learning difficulties were on her and/or her ability to carry out day to day activities. She did this in relation to her anxiety and OCD but had chosen not to in relation to her learning difficulties.

Was the respondent aware or ought reasonably to have been aware that the claimant was disabled by reason of any of the conditions at the material time?

92. Given our findings above about the learning difficulties all our conclusions regarding disability refer solely to the claimant's conditions of OCD and anxiety.

93. We find that the respondent ought reasonably to have known that the claimant suffered from anxiety and OCD. We base this conclusion on the following evidence:

(i) It was accepted that the claimant had said she got anxious from time to time. Although Ms Worsfold said that she did not know this was a medical condition, it is clear that they knew she got anxious.

(ii) Ms Godley accepted in evidence that she knew the claimant took medication. She says that she did not ask or know what is for but she did not know that the claimant was taking medication for a specific condition.

(iii) Ms Godley also states in her witness statement paragraphs 18 and 19 that the claimant took 5 minutes out when she got stressed and raised her voice at the children when she got stressed. She says this was not often but also says it happened maybe once a week. The Tribunal considers that once a week for such behaviour is a lot and regular and should have given the respondent more than pause for thought particularly in a setting with young and by all accounts behaviourally challenging children.

(iv) They received the letter at pg 371 from the Local Authority stating that they had on record that the claimant suffered from Anxiety. We accept both the claimant's and Ms Worsfold's evidence that the content of the letter was misread and misrepresented to the claimant by accident. Nonetheless it is clear that the respondent was informed, in writing, by the local authority that the claimant had anxiety and that adjustments might need to be made for her. Misreading the letter should not be a defence to whether they ought reasonably to have investigated this situation further. They ought reasonably to have been expected to read the letter properly and to investigate it further.

(v) Although given less weight, we do think that the clear level of parental involvement and interference should have raised significant questions as well given the context of an employee who was frequently taking time out for stress, who had told them she was anxious, who was on medication and whose local authority had sent a form stating that she had a condition and querying what support she was receiving as a result.

94. In coming to our conclusions as to whether the respondent ought reasonable to have known about the claimant's conditions of OCD and Anxiety we have considered the EHRC code and the various cases on this matter. The EHRC Code advises that employers must "do all they can reasonably be expected to do" to find out this information, although it emphasises that "when making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially" (*paragraph 6.19*).

95. We do not believe that the respondent took any steps to find out anything about the claimant's health in this case. They were clearly told that she had anxiety and was on medication. We accept that they must respect an employee's privacy but it would have been reasonable, when Ms Godley found out that the claimant took medication, for her to enquire confidentially why she was on that medication. Further, in light of the various behavioural issues we have concluded above we find that the respondent ought to have asked what caused the claimant to need such frequent times out, to raise her voice so often and to take medication, particularly in light of her telling them that she had anxiety.

96. Ms Worsfold and Ms Webb both stated that they did not know 'anxiety' was a condition capable of being a disability. However they work in a nursery environment with children with challenging behaviour and we are sure that they would have come across a variety of mental health conditions in such a role which we are surprised would not include anxiety in some way being recognised as a medical condition.

97. Even if we are wrong in that (and to be fair this was not put to them in the course of the hearing) and anxiety did not mean the same to them as perhaps depression or another mental health diagnosis, they did not at any time try to find out what it meant despite the claimant's disclosure to them that she needed regular 'time out' as a result of this condition, despite one member of staff knowing she took medication for 'something', and despite the local authority writing to them asking them what reasonable adjustments they were making for the claimant. Ignoring all of those indicators along with the claimant's behaviour in the work place was not reasonable in all the circumstances.

98. The requirement to make reasonable enquiries was then, in our view, redoubled by the arrival of the Local Authority letter informing them of her anxiety. Their failure to deal with this properly amounts to a failure to do all that could reasonably be expected of them in the circumstances.

99. Our conclusions follow the EAT's reasoning and findings in ***Department of Work and Pensions v Hall UKEAT/0012/05***. The EAT upheld a tribunal's decision that an employer should have known about an employee's disability even though she had not specifically informed the employer that she was disabled.

100. We also consider that this case can be distinguished from the cases where employers have not reasonably known about an employee's condition. This is not a situation such as in Wilcox v Birmingham CAB Services Ltd UKEAT/0293/1 where the employee refused to provide access to medical records or denied that they had a condition. The reverse is true. The claimant told them that she had conditions and that she took medication. Further the local authority told them in writing that she had anxiety and yet they failed to take any action whatsoever to investigate this further.

101. The most recent case on this matter, Donelien v Liberata UK Ltd [2018] EWCA Civ 129, the Court of Appeal found that the employer had taken reasonable steps such as asking further questions of its Occupational Health advisers regarding the employee's health and had held appropriate return to work meetings. They had not 'rubber stamped' the advice of their doctors but come to their own conclusion.

102. However in this case, the employer made no conclusions because they made no enquiries but appeared to either wilfully or ignorantly ignore the various indicators that demonstrated that the claimant was diagnosed with the conditions of anxiety and OCD.

103. We go on to consider whether they ought reasonably to have know about the substantial disadvantage that any provision criterion or practice (PCP) might have placed the claimant in when considering the PCPs and reasonable adjustments below.

Was there a provision, criterion or practice applied by the respondent namely:

(i) Not to allow employees to be accompanied to meetings and
(ii) Not to hold meetings with an employee's chosen companion after the employee had resigned

104. We have found that it was breach of the respondent's contractual policies to hold meetings with the claimant without notice, without the right to be accompanied and to give her a written warning.

105. We find that this was a practice given that both Ms Webb and Ms Worsfold stated in evidence that they did not know that they were acting in breach of their policies when they convened the back to work meeting and the subsequent appeal against the written warning. They would have followed this process in the same way for anyone returning to work after sick leave and triggering the sickness absence meetings as per their policies. The fact that they could not recall whether they did this for others before realising it was the wrong procedure is irrelevant. They were clear that they thought they were following the correct procedure at the time. The fact that Ms Webb tried to state that this was not a disciplinary meeting despite a disciplinary sanction being meted out at the end, shows that at this time their practice was to hold return to work meetings where sanctions were applied without notice and therefore in a way that meant that the claimant could in effect not be accompanied.

106. We therefore conclude that the practice of holding the meetings without notice and therefore without giving the claimant the opportunity to be accompanied amounts to a PCP in these circumstances.

107. We do not accept the respondent's evidence and submissions that had the claimant asked she would have been allowed to be accompanied as demonstrating that this PCP did not exist. Had the respondents been aware of the proper process and applied their procedure the claimant would have been informed of her right to be accompanied and she could have asked. The fact that they applied a different procedure does not mean it is not capable of being a practice.

108. The second PCP relied upon is the failure of the respondent to meet with Dr Coulton after she had resigned. Dr Coulton wrote to the respondent requesting a meeting with the respondent on 17 May 2017 (pg 380). This request is after the claimant had resigned and after her job offer at Banana Moon nursery was withdrawn because of the reference provided by the respondent. The claimant wanted to be able to rescind her resignation because she could not move on. Dr Coulton wanted to discuss this situation with the respondent. He specifically asked them not to tell the claimant about his letter. The respondent did not respond but wrote to the claimant on 22 May 2017 accepting the claimant's resignation , informing her that the written warning was being removed from her record and giving her last date of employment with them as 26 May 2017.

109. We conclude that this was a one-off decision by the respondent in these circumstances. They chose not to engage with the claimant's father and this does not amount to a PCP. We agree with the respondent's counsel's submissions on this point that this is more akin to a reasonable adjustment being sought than a PCP in itself. Further this decision was a decision made in

response to a very specific set of circumstances rather than a policy or practice. The respondent decided that they could not meet with the claimant's father when she herself had not requested it and appeared not to know about it and when they had had multiple difficulties with the respondent's father prior to this point albeit not as many as they were to have in the following weeks. We conclude that this is not capable of being a provision criteria or practice. This was a decision made in a unique set of circumstances.

If the PCPs were applied by the respondent was the claimant placed at a substantial disadvantage in comparison to a person who was not disabled? The claimant says that she was disadvantaged because her condition means that she was unable to deal with meetings on her own.

110. We find that the respondent's PCP where the claimant could not in fact be accompanied at the relevant meetings did place her a substantial disadvantage compared to someone without anxiety and OCD. It is acknowledged that many employees find meetings where disciplinary action is taken very stressful. This is no doubt compounded when it happens without notice or the right to be accompanied and a condition of anxiety and OCD must make a situation such as this worse.

111. We conclude that had the respondent properly taken steps to investigate the claimant's conditions, then they could reasonably have been expected to understand that having a meeting at which a disciplinary sanction is given out, without being accompanied, would place the claimant at a significant disadvantage when compared to someone without that condition.

112. The respondent submitted that the claimant was not placed at a disadvantage because she would not have raised anything differently because she was fixated with the fact that her sickness was legitimate and that any sanction was therefore unfair. However we do not accept that. We find that it is perfectly possible that had the claimant been accompanied by another member of staff or possibly even her father given that at that point his relationship with the employer was not as strained, she would have been enabled to ask for the correct policies and had the opportunity to put forward points which would have flagged that the respondent was not following its own procedure regarding sickness absence warnings.

113. The respondent stated that the claimant was able to articulate her thoughts but it is probable that had she been accompanied she would have been able to do so better or her companion would have been able to consider the situation more clearly. The respondent noted that the claimant shrugged a lot in the meetings thus, they thought, indicating that she did not really care what was happening or have any response to things. The claimant stated in evidence that she shrugged because she was anxious and did not know how to respond to questions. Had she been accompanied this could have been

different. It is not a great reach to think that had she been accompanied she or her companion would have asked why she was being disciplined and what the policy for sickness absence/return to work meetings was whereas her anxiety prevented her from engaging with the process on that level.

114. **Was it a reasonable adjustment to**:

(i) Allow the claimant to be accompanied to the meetings

We consider that this would have been a reasonable adjustment particularly given that it was in their written policy and ought to have been what happened in any event. The adjustment would have alleviated the disadvantage.

(ii) To hold a meeting with her chosen companion (her father) after she had resigned.

This was pleaded as a reasonable adjustment as well as a PCP. We do not conclude that this was a reasonable adjustment in the circumstances. The claimant's father by this time had soured relations considerably with the respondent in terms of his dealings with them about the payslips. His letter requesting this adjustment specifically states that they should not communicate with the claimant about the matter and in those circumstances, we consider that it was probably appropriate for the respondent to refuse to meet given the parameters he placed around that meeting and the reasons for it. Had the claimant written and asked to be accompanied and a dialogue engaged with about the possibility of being accompanied by an outside third party where relations were not already strained, then our conclusion might have been different.

(iii) Conducting the disciplinary, appeal or grievance meeting in a way which does not disadvantage or patronise me.

We conclude that the respondent ought to have given the claimant notice of both hearings in order to be able to prepare and that this failure clearly disadvantaged her as she would have been able to prepare in a way that alleviated any anxiety and allowed her to think things through and ask for any policies. This adjustment could have alleviated any disadvantage she suffered as a result of not being accompanied.

We think it would have been reasonable for the respondents not to tell the claimant to eat properly. Their actions disadvantaged her on the basis that her anxiety affected her confidence and their failure to treat her respectfully as an adult when she suffered from anxiety would have exacerbated that. She has said that her anxiety and OCD meant that she sometimes struggled to communicate. The respondents and notes said that she shrugged in response to some points and we believe that this inability to properly communicate when faced with difficult and critical comments is disadvantageous.

(iv) Explaining the significance and potential consequences of disciplinary hearings

We believe that this would have been a reasonable adjustment. Had the respondent explained the purposes of the meeting and again allowed the claimant time to process this information, it would have enabled her to be less anxious and to take part properly in the meetings in circumstances where she was not being accompanied.

(v) Ensuring that the minutes of the disciplinary appeal or grievance meeting were properly recorded and a written copy of the minutes given to me as soon as possible after the meeting so that I was clear of the decision, what was expected of me in the future, and what action I was entitled to take after the meeting.

It follows that if the PCP being applied meant that the claimant was not allowed to be accompanied then it follows that her having the minutes of the meeting soon after would have assisted her in preparing her appeal and understanding what the implications of the situation were for her. It is common knowledge that in stressful situations, such as a disciplinary meeting or return to work meeting, people do not always take in all the information given to them at that meeting. Someone suffering from anxiety could, we believe, suffer more from that and had the claimant had access to the minutes she may have been able to properly consider what had happened and seek assistance. However, the claimant submitted a full appeal and the minutes of the meeting would not have assisted that process.

(vi) Ensuring that formal procedures were followed properly

It is harder for someone with anxiety to deal with incidents that happen outside the rules. We find that had the respondent followed its policies correctly the claimant would have been accompanied at the meeting and would not in any event have received a written warning and therefore no disadvantage would have occurred.

(vii) Disciplinary appeal and grievance meetings are conducted with a fair degree of flexibility

The claimant did not address the tribunal as to what flexibility she required that has not already been pleaded above. We therefore cannot find that something as vague as this amounts to a reasonable adjustment.

(viii) Sufficient notice given of disciplinary appeal and grievance meetings is given so that I am able to prepare in advance.

This would have been a reasonable adjustment and is dealt with above. above.

(ix) Full and detailed information of the disciplinary, appeal and grievance meetings is given in advance.

Yes all policies ought to have been given and would have alleviated the disadvantage suffered by not being allowed to be accompanied at the meeting.

115. It is our finding that the respondent's failure to make those reasonable adjustments to their policy of conducting return to work/disciplinary meetings without allowing her to be accompanied directly resulted in the claimant receiving a written warning. We have concluded that the written warning was a material part of the reasons as to why the Banana Moon job offer was rescinded. We consider it extremely improbable that the offer would have been rescinded had the claimant had a clean disciplinary record as the remainder of the reference was unremarkable albeit not a glowing reference.

116. Although we have accepted that the telephone call between Ms Godley and those seeking the reference was not solely about the written warning, we believe it is more likely than not that clarification about her employability would not have been sought had she had a clean disciplinary record. Whilst we acknowledge that further information was sought and other parts of the reference were less than brilliant, they were not that negative and we conclude that the existence of a formal written warning had a decisive negative impact.

Victimisation

117. The protected act relied upon by the claimant was her ET1 dated 20 June 2017. During the hearing it became apparent that the claimant was also relying upon her threat to take legal action in the letter dated 24 May 2017. The respondent admitted that both are capable of being protected acts within the meaning of section 27(2) Equality Act 2010 and we agree.

118. The detriments relied upon by the claimant are:

(i) The allegedly unfair reference given to other nurseries namely Banana Moon, Daisy Chain and Tinies.

(ii) The DBS referral on 15 June 2017.

119. The ET1 was submitted on 20 June after all the references referred to above were provided and after the DBS referral. We therefore find that none of the detriments occurred because of that protected act.

120. The reference provided to Banana Moon/Tinies predates the threat of legal action in the letter dated 24 May 2017 so cannot have occurred because of the threat of legal action contained therein.

121. The Daisy Chain reference post-dates that letter. However in the reference provided to Daisy Chain they have removed any reference to the written warning. The claimant stated that although they did not make any negative comments or include the written warning, they provided a factual only reference which did not comply with the references required for people working in childcare.

122. We conclude that the reason a factual only reference was provided to Daisy Chain was the fact that the claimant had been referred to DBS as a result of the child escaping. We do not believe that it was as a result of the threat of legal action in the letter dated 24 May.

123. The respondent was faced with a decision as to whether to disclose that they had made the DBS referral which had not yet been concluded, or give no information at all, otherwise they felt that they could have been misleading to the next employer. They chose the latter. Whilst we accept that this may have been in breach of the industry norm in childcare we do not think that it arose in any way because of the claimant's threat to take possible legal action. The issues surrounding the DBS referral and the concerns raised about the previous reference were more important at that time than the possibility of possible legal action.

124. The DBS referral arose from the very difficult situation of the child escaping. Whilst a huge amount of tribunal time was spent examining photos and maps of the nursery, we conclude that the investigation into the child's escape was reasonable in all the circumstances. Whilst we accept that the claimant and her father will never accept any responsibility, we have no evidence to suggest that the nursery's investigation and conclusions were unreasonable and as per our factual findings above we believe that Ms Worsfold's investigation was reasonable in all the circumstances.

125. We accept Ms Worsfold's evidence that in those circumstances and in accordance with LADO advice they have to refer to DBS. That DBS referral took place before the ET1 and only when they had a vague threat of legal action from the claimant's father. We conclude that it was clear from all the evidence given that this was an incredibly emotional and worrying time for all the staff at the nursery given the significant implications of the child's escape. We do not believe that it was unreasonable for them to make the referral given their conclusions and their conclusions were based on a reasonable investigation. We therefore do not conclude that it occurred as a result of the claimant or her father's threat of legal action in the letter dated 24 May 2017.

<u>Harassment</u>

126. The claimant says that the unwanted conduct relating to her disability was:

(i) **The manner in which the return to work meeting on the 16th March 2017 was conducted**.

We do not find that the failure to give notice or disallow her accompaniment was related to her disability. It placed her at a disadvantage but was not related to her anxiety or OCD.

(ii) **On an occasion the claimant was told in a very patronising manner that if she had flu she should be at home in bed**.
We do not find that this comment, if it happened, related to her disability. The comment related to the fact that they were in a childcare environment and that if someone was ill they should not be coming into work. We do not find that it was said in a patronising manner simply that she was told to go home if she was ill which is reasonable in the circumstances and not related to her anxiety or OCD.

(iii) **When the claimant has asked her father to help her she was told by the respondent that she was old enough to stand on her own two feet and not involve her father.**
We find that the various references made to the claimant to stand on her own two feet and do things for herself is related to her anxiety and OCD. She clearly needs additional support and guidance from her parents because of her disabilities and inferring that she was being 'pathetic' for needing his help could amount to hostile or degrading treatment or have that effect. Whilst we make this finding we also accept that the way in which the claimant's father had conducted himself in all his interactions with the nursery meant that it was reasonable for them to not want to have to deal with him.

(iv) **On the 24th May 2017 she was told off for using her mobile phone.**
We do not find that this related to her disability. This related to the fact that she was breaching a very clear policy that staff could not use their phones whilst at work. We do not accept Dr Coulton's submissions that because she was in the toilet she was not at work. The situation was highly charged and the claimant knew that she should not have been calling her father. Otherwise she would not have gone to the toilet to do so.

(v) **Being told by the respondent at the appeal hearing that perhaps she should look for another job outside childcare since she was not very good with children.**
We were provided with no evidence that criticism of the claimant's performance at work was either frequent or related to her disability. In any event we have concluded that this comment did not occur as there is no evidence to support that the respondent felt the claimant was not capable of carrying out her job and it therefore we prefer the evidence of the respondent in this regard.

(vi) On dates unknown the claimant says she was made to feel guilty when she asked to rearrange her shift so she could attend hospital for venesection.
We were given no information as to how this procedure related to her anxiety or OCD and therefore conclude that it is not related to her disability.

She did not give details of how she was made to feel guilty nor why or how it related to her anxiety or OCD.

(vii) **Not being allowed to take a full week's holiday during February or March 2017**.
We were not told how this incident related to her disability. We understand that she wanted to be able to take leave to spend time with her mother but it is not apparent how this refusal relates to her anxiety or OCD.

(viii) The Claimant was picked on in relation to how she did things.
There was no evidence provided of the claimant being constantly criticised and picked on by staff for the respondent. The claimant's witness evidence gave very little detail of this and it was not put to the respondent's witnesses that they behaved in this way towards the claimant. We therefore had insufficient evidence to conclude either that this happened and in particular whether it related to her disability.

127. In relation to the one issue we have found relates to her disability, namely that she was told to stand on her own two feet and that she should not involve her parents so much we have considered whether it had the purpose or effect of creating an intimidating hostile degrading humiliating or offensive for the claimant. We do not believe that the respondents deliberately wanted to humiliate or offend the claimant or create a hostile or degrading environment for her. We believe that their comments were intended to try and minimise the amount of time they had to deal with Dr Coulton and impress upon her the importance of her complying with their rules as opposed to her parents (e.g. she should have called in sick not her mother).

128. Nonetheless, the claimant obviously does depend on her parents for support because of her anxiety and OCD. The respondent witnesses' various comments regarding her apparent inability to manage some aspects of her life alone, particularly when said in a manner which was not supportive but was either in frustration (the issue regarding payslips) or in a context where she was being disciplined (her mother calling in sick for her) could, objectively, have had the effect of creating a hostile, intimidating or degrading environment because it meant that she was made to feel bad for needing her parents to support her.

129. We therefore conclude that in relation to the sole issue of the respondent's comments about her having to stand on her own two feet and not allow her father to become involved amount to an act of harassment on grounds of disability.

130. The tribunal was not given sufficient information to make a finding in relation to remedy and therefore a remedy hearing will now be listed.

Employment Judge Webster

Date: 11 July 2018