THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE TRUSCOTT QC**

Members: **Ms S MacDonald**
Mr W Dixon

BETWEEN:

Ms S Fisher **Claimant**

AND

Brighton & Hove City Council **Respondent**

ON: **5, 6, 7, 8 and 9 February 2018**

Appearances:

For the Claimant: **Ms A Reindorf of Counsel**

For the Respondent: **Mr A Smith of Counsel**

JUDGMENT

The claimant's claims of disability discrimination contrary to sections 13, 15 and 20 and 21 of the Equality Act are not well founded and are dismissed.

REASONS

PRELIMINARY

1. The claimant gave evidence on her own behalf. The respondent led the evidence of Ms Rachel Simmonds, Head Teacher of West Blatchington Primary and Nursery School. Ms D Collis who, at the time, was Deputy Headteacher of the same school, Ms C Regan Business Manager of the School, Ms B. Nash a class teacher at the School and Ms R Hatton a nursery nurse at the School. The evidence of Amanda Miller, School Partnership Adviser, was taken on the first day of the hearing by video link with her in South Africa. The evidence contained in the

witness statement of Ms Rachel Tuck, Inclusion Leader, was not challenged by the claimant and is accepted as her evidence.

2. There were two volumes of documents to which reference will be made where necessary.

ISSUES

3. The parties had agreed a list of issues approved by EJ Baron on 24 May 2017 as follows.

Discrimination arising from disability S15 EqA

1. With reference to the matters for which the Claimant was criticised on 15 April 2016 as described in paragraph 11 of the Grounds of Complaint (GoC)-
   a. Did the criticisms relate to something arising from disability (carpal tunnel syndrome/anxiety & depression)?
   b. If so were the criticisms unfavourable treatment
      i. in themselves and/or
      ii. the manner they were delivered?
   c. If so was the treatment a proportional means of achieving a legitimate aim?
2. Was the requirement for the Claimant to undergo additional observations (paras 12,13 GoC) made because of something arising from disability (carpal tunnel syndrome/anxiety & depression)?
   If so was it unfavourable treatment?
   If so was the treatment a proportional means of achieving a legitimate aim?
3. With reference to the matters for which the Claimant was criticised following the observation on 24 June as described in paragraph 16 of the Grounds of Complaint (GoC)-
   a. Did the criticisms relate to something arising from disability (carpal tunnel syndrome/anxiety & depression)?
   b. If so were the criticisms unfavourable treatment?
   c. If so was the treatment a proportional means of achieving a legitimate aim?

Direct Discrimination s13 EqA

4. With reference to the observation on 15 April 2016 was, because of disability, the Claimant treated less favourably than Briony Nash by
   a. Receiving the criticisms as described in para 11 GoC and/or
   b. Being subjected to additional observations, when Briony Nash was not?

Failure to make reasonable adjustments ss20 & 21 EqA.

5. On 19 January 2016 did the Claimant agree to stop formal support meetings?
   Did the Respondent apply (as a PCP) an expectation that staff be resilient to change?
   If so did this substantially disadvantage the Claimant compared with non disabled staff?
   If so would it have been a reasonable adjustment to continue support meetings?

6. Was the Claimant expected to take lead responsibility in the job share arrangement (para 6 GoC)?
If so was it a PCP made because she was full time?
If so did this substantially disadvantage the Claimant compared with non disabled staff?
If so would it have been a reasonable adjustment not to have imposed the expectation?
7. Was the requirement for the Claimant to take school wide responsibility for clubs because she was recruited as a UPS2 teacher (para 8 Grounds of Resistance) a PCP?
If so did this substantially disadvantage the Claimant compared with other UPS2 non disabled staff?
If so would it have been a reasonable adjustment not to have imposed the requirement?
8. Was fixing an observation to take place on 15 April 2016 a PCP (para 10 GoC)?
If so did this substantially disadvantage the Claimant compared with non disabled staff?
If so would it have been a reasonable adjustment to have arranged the observation for a later date?
9. Were criticisms made by Ms Collis to the Claimant on 15 April 2016 excessively hostile?
If so was this a PCP applied to reinforce the importance of her words that substantially disadvantaged the Claimant compared with other non disabled staff?
If so would it have been a reasonable adjustment for Ms Collis to have been
a. More sympathetic and supportive and/or
b. Allowed the Claimant to have someone with her for support?

FINDINGS OF FACT

4. The claimant qualified as a primary school teacher in 1998. She had had no work or health problems when she applied for a vacancy of Early Years Leader at West Blatchington Primary and Nursery School in October 2013. The role attracted a Teaching & Learning Responsibility payment and the claimant was on the Upper Pay Scale (UPS2). She was interviewed by a panel which included Ms Simmonds and was offered the appointment to start in January 2014.

5. She led the Early Years Foundation Stage ("EYFS") department and teaching in nursery. At that time there were also 2 Reception classes under her management. She had positive professional and personal relationships with Ms Simmonds and Ms Collis, the Deputy Head. As with all schools, teacher observations are a core part of the school's monitoring schedule to ensure that the children are receiving good educational provision. West Blatchington's policy was to observe teachers three times per year by two observers. During the first two terms of 2014, the claimant carried out a joint observation with Ms Collis of reception teacher Ms Nash. Her own observations in April and June 2014 were successful. These were also carried out by Ms Simmonds and Ms Collis.

6. After experiencing some health issues, the claimant was signed off work on 13 October 2014. The Council sought Occupational Health advice and received reports dated 6 January 2015 [615 and 616] and 1 April 2015 [620 and 621] which said that the claimant was unfit for work and there was no prognosis for her return to work. Due to her continuing absence, the City Council with involvement of Ms Regan from the School commenced its capability procedure and convened a stage 3 hearing for 27 April 2015. This meant that she was at risk of dismissal. The claimant engaged a solicitor who corresponded with the Council and raised two grievances. An Occupational Health report dated 14 July 2015 [403 – 407] indicated that the claimant would be fit to return to work in a limited capacity at the start of the new school year.

7. The claimant received the result of her grievance on 4 August 2015 [652-654] and was invited to a formal meeting with Ms Simmonds on 1 September 2015 to discuss the Occupational Health report and her return to work [171-172]. Further correspondence was undertaken by the claimant's solicitor which resulted in Ms Simmonds offering a return to work meeting [193]

8. The School conducted a detailed Occupational Health report review meeting with the claimant on 1 September 2015 [173 – 179].

9. On 19 October 2015, the claimant had a return to work meeting with Ms Simmonds and Ms Regan. Reasonable adjustments, working arrangements and timetable were discussed and agreed and recorded in the return to work form with notes and minutes. One of these was that Ms Simmonds would hold a review meeting with the claimant every 7-10 days [195 – 204a]. Two further adjustments were added to the nineteen already agreed [228]. Thus, she commenced her phased return to work. A stress risk assessment was also carried out [210-213]. The phased return was to last 8 weeks and start with the claimant working on Monday and Thursday afternoons only up to full hours in week 8 with the time in school being built up gradually.

10. Between 19 October and 15 December 2015, the claimant attended review/link meetings with either Ms Simmonds or Ms Collis. The School also arranged for the claimant to benefit from a 'buddy' member of staff, Ms Tuck, who provided regular support and assistance. These buddy meetings took place on 2 November 2015, 6 November 2015, 11 November 2015, 20 November 2015, 2 December 2015, 28 January 2016 and a date in mid-February 2016.

11. On 2 November 2015, the claimant had a week 2 review meeting with Ms Collis [217]. At this meeting, it was confirmed that "All actions from the Return to Work Meeting have been addressed other than an update on Safeguarding but you have sought out Natalie and this process has been started." [217]. A Full Display Screen Equipment ("DSE") assessment was also carried out [218 – 226].

12. On 6 November 2015, a stage 1 absence review meeting took place with Ms Simmonds and Sonya Taylor (HR) at which the claimant's health was discussed in detail [231 – 236]. In the course of this meeting, Ms Simmonds asked her [234]:

> "Considering the 19 reasonable adjustments that we agreed with you at the return to work meeting, are there any other adjustments or actions

> that we could take to support you further in your return to work and with helping you to manage your conditions?"

The claimant responded "No there isn't". Ms Simmonds said a little later "…One thing we need to be aware of, and whilst I do not want to dampen your enthusiasm, is being careful to stick to the recommended timetable. You had mentioned in a previous meeting that you may come in to observe lessons in addition to the timetabled sessions, but we want to ensure that you do not become over tired, so we will need you to stick to the timetable that was suggested by OH" [235]. The claimant was not issued with any sanction in respect of her absence from work [236].

13. On 13 November 2015, the claimant attended a week 3 review meeting with Ms Simmonds [228]. During this meeting, the claimant confirmed that her first teaching sessions had gone well; she had enjoyed being in the Reception class and class inputs and management of the environment had been fine; she was being assisted with scribing; the structure of the timetable was useful; the Foundation Stage team had been supportive of her; she valued the buddy meetings; she felt valued after the outcome of the stage 1 absence review meeting; and she had found the new equipment useful in terms of her joint pain.

14. On 20 November 2015, the claimant attended a week 4 review meeting with Ms Simmonds [237]. During this meeting, the claimant confirmed that she was feeling more confident in the classroom. The claimant also stated, however, that her wrists had become more painful and she had requested surgery to treat her carpal tunnel syndrome.

15. On 27 November 2015, the claimant attended a week 5 review meeting with Ms Regan [238 – 239]. During this meeting, the claimant confirmed that she felt the teaching had been positive; that she felt more comfortable in Reception than nursery class; and that her staff relationships remained good.

16. On 2 December 2015, Ms Collis conducted an informal observation of the claimant's phonics teaching [282]. On 3 December, the claimant emailed Ms Simmonds to relinquish her EYFS leadership.

17. On 4 December 2015, the claimant attended a week 6 review meeting with Ms Regan and Ms Collis [247 – 250]. It was noted that she was still significantly protected from the unknown and change as part of her phased return and that it "is something she will just need to face". They discussed her wish to relinquish her EYFS leadership. A different teaching proposal was put forward for the Spring term whereby she would work alongside Ms Nash in the Reception class for two days each week. This is described as a job share but the two teachers would be on duty together for two days and only one teacher was necessary. The claimant would be the sole teacher on the 3 remaining days. The note [249] refers to an agreement being drawn up setting out responsibilities in advance of the job share commencing. The claimant confirmed that she did not require any additional adjustments over and above those that were already in place through to the end of the term.

18. On 11 December 2015, the claimant attended a week 7 review meeting with Ms Regan and Ms Simmonds [255 – 256]. At this meeting, the claimant's request

to relinquish her EYFS leadership was formally accepted by the School which noted that this would lead to a reduction in pay. The claimant said she was coping better than she expected to. The School again offered to purchase additional items / equipment for the claimant, if she felt this may be helpful. The claimant also confirmed that she had been working with Ms Nash to agree planning and priorities to ensure the job share worked. The frequency of the review meetings was also discussed and it was agreed that they be weekly for the first two weeks of Spring term and then fortnightly with a review in February

19. A further Occupational Health report was also produced on 11 December 2015 [420 – 424]. This report advised, among other things, that she was fit to return to full time duties from 14 December, she was making a good recovery from her health problems; her symptoms of anxiety and low mood were much reduced from previously; she had developed good coping strategies in relation to her health issues; the School's agreement to the claimant relinquishing her TLR leadership role was a "sensible adjustment and will help to speed up her recovery"; the claimant's confidence would continue to increase, and a degree of "work hardening" would "naturally occur as she re-familiarises herself with all aspects of being back at work"; and there was nothing else that the School should be aware of to support the claimant, other than their "continued support and good communication", and meeting "informally on a regular basis to check in with her". There was no specific reference to the review meetings either continuing or stopping.

20. On 4 January 2016, the School commenced Spring term as did the claimant's resumption of full time working. The reasonable adjustments remained in place. The Reception class was effectively overstaffed with 1.6FTE teachers. This was put in place to provide consistency for the children. Other staffing of the class changed as Ms Hatton had to take the place of an Individual Needs Assistant on a one to one basis each morning, she then resumed her Teaching Assistant role in the afternoon. On Monday, Tuesday and Wednesday her role did not need to be covered as the claimant and Ms Nash worked together. On Thursday and Friday when Ms Nash did not work, Ms Hatton had her INA role until 1.40 then she reverted to her TA role. This left the claimant without a support member of staff from 1.10 to 1.40.

21. On 19 January 2016, the claimant attended a meeting to review the December Occupational Health report and conduct a link meeting with Ms Simmonds and Ms Regan [258 – 262] and [263 – 266]. In relation to protection from the unknown, the claimant said she was not afraid to ask for help [259]; she had no concerns about returning after Christmas and having lots of new staff was nice and made it easier, as she did not feel she had to explain her absence [260]; the working relationship with Ms Nash was working very well and there was nothing else in the classroom environment that the school could support her with [260];; they were sharing responsibilities between them; and were both very clear and had the same views and expectations of the pupils and the children [260]; the job share was going well, both with the children and parents, and the children had come back very positively [261]; she did not feel that she had any particular additional training needs [261]; a light observation had been conducted and there would be another one before March [261] she was confident that she would continue to feel better and felt that the extended phased return had really helped her recovery [262].

22. Ms Regan had to leave the meeting shortly after 4pm (when she emailed the notes at [258 – 262]), in order to collect her children from nursery and school. The claimant and Ms Simmonds remained in the meeting room. Ms Simmonds said in cross examination "At the end of that meeting, I spoke to the claimant as we got up and recalled saying do we need to schedule another meeting. The claimant turned to me and said I don't think we need to at the moment." The claimant disputes that this exchange took place but in the context following a very positive meeting, it is likely to have done so and the Tribunal so finds as a fact. At no point subsequently did the claimant complain about the cessation of the review meetings or request that there be one.

23. Both Ms Collis and Ms Regan confirmed that Ms Simmonds informed them, shortly after the 19 January 2016 meeting, that the claimant had stated she no longer felt the need for formal review meetings, but that if she wished to reinstate them at a future date, that would be possible. Rebecca Hatton confirmed that she saw Ms Collis every day as part of her normal line management responsibilities as would the claimant, so she could have asked then.

24. In mid-February the claimant had her 7th buddy meeting with Ms Tuck and informed her that she felt these meetings were no longer necessary. Ms Tuck made it clear to the claimant that she was still willing and available to meet with her, if she thought this would be beneficial.

25. In February, Ms Collis met the claimant for her appraisal at which stage an Upper Pay Scale 2 target was discussed. The claimant had been employed as a UPS2 teacher and ordinarily such a teacher is expected to make a significant contribution to both learning and teaching and the wider life of the School. The claimant agreed to take on responsibility for a project around reporting children's progress in extracurricular opportunities, initially for the summer term [298]. There was a dispute about how much work this entailed. The Tribunal was satisfied that a number of the responsibilities had been carried out and that the claimant would also have administrative support. As the claimant's own message on [299] observed, there was "already a wealth of promotional materials for existing clubs with links to their web sites etc…", and Ms O'Connor was happy to take responsibility for other aspects of this work. The Tribunal considered the work not onerous for the claimant. The documentary evidence of the claimant's work in relation to this target appears in [299 – 300] and amounts to a message addressed to the organisers of school clubs, asking them to provide a brief list of their aims and objectives.

26. Ms Nash's teaching was formally observed on three occasions on 8, 9 and 15 March 2016; various strengths, as well as some areas for improvement (e.g. in respect of the environment planner), were identified [316 – 320].

27. There was a meeting to provide joint feedback from the week commencing 1 March 2016 [280 – 281]. This feedback specifically recognised, at the outset, that it was "Good to see everyone's roles clearly identified throughout the day." On 16 March 2016, there was a meeting between the claimant, Ms Collis and Ms Nash to discuss the difficulties they were having with the environment planner. Whilst Ms Collis was supportive and professional she was asking questions around the teaching provision. The claimant became distressed and suffered a panic attack, and Ms Nash left the meeting. The claimant explained to Ms Collis that she had

been suffering from a cold and was worried about her upcoming carpal tunnel surgery, which she feared might be cancelled because of it. Ms Collis insisted on booking the claimant a taxi home and texted her that evening to check on her wellbeing. The claimant thanked Ms Collis for her "understanding yesterday", and (at 15:55 on 17 March 2016) stating that she had "Slept all day and feels lot more like my usual self. Xx [122]"

28. Following the claimant's absence from work on 17 March 2016, it was mutually agreed between the claimant and Ms Collis that her first formal teaching observation (which had originally been scheduled for 17 March 2016) would be rescheduled for 15 April 2016.

29. The claimant underwent carpal tunnel surgery on both wrists on 21 March 2016. That evening, the claimant's partner texted Ms Collis to inform her that "Susie's op was a success and she is home now. Xx" [132c]. Ms Collis responded: "Thanks for letting us know – send her our love from school – hope she recovers quickly. X". During the Easter holiday, the claimant messaged Ms Collis, stating that she was "Pleased to report I'm now in much less pain than before…", to which Ms Collis replied "That's good news – see you next week."

30. The claimant returned to work on 11 April 2016 and had a return to work meeting / discussion with Ms Collis and signed a return to work interview form [302 – 303]. The claimant did not say that she required any additional support, various adjustments having been put in place to support the claimant with her hands including a gel wrist support, a scribe when necessary and support staff to move and set up furniture.

31. On the morning of 12 April 2016, the claimant sent Ms Collis another text message, stating "Do you need me to stay in class this morning? I'm happy to stay to see the chd in at least but happy to stay longer / all am if needed" [132c**]**. The claimant said nothing about her ability to carry out her work.

32. On 13 April 2016, the claimant's agreed UPS 2 target was confirmed in writing [298].

33. On 15 April 2016, Ms Simmonds and Ms Collis conducted a formal observation of the claimant's teaching. The claimant had not had formal observation for a year and ten months. This observation resulted in a rating of "requiring improvement" with some features of inadequate provision. On 16 April 2016, Ms Collis texted the claimant to say "Sorry we didn't get to feedback on Friday – we had a string of parents and then it all got very late. Could we meet you after school on Monday for feedback?" The claimant replied "No problem. Monday after school is fine. Have a good weekend. X" [132c]

34. Ms Collis and Ms Simmonds duly provided their feedback to the claimant after school on 18 April 2016. The triangulation sheet is at [304 – 308], and in the course of her oral evidence the claimant accepted that this written feedback reflected the honest views of Ms Simmonds and Ms Collis and reflected what was communicated to her orally on 18 April 2016. The claimant alleges that she received no positive feedback; however, from the triangulation sheet there was some.

35. The claimant did not raise any complaint about the 15 April 2016 observation at the time, whether in respect of the content of the feedback or the manner in which that feedback was communicated to her. The claimant was bound to be upset by the contents of the feedback as it concerned her teaching skills which had not been questioned previously.

36. As a number of matters had been identified as requiring improvement, in terms of the claimant's teaching provision, a Personal Development Plan was constructed and agreed between Ms Collis and the claimant [309 – 312]. On 22 April 2016 there was a Personal Development Plan meeting between the claimant and Ms Collis. The claimant's PDP was agreed and recorded in writing [309 – 312].

37. On 15 May 2016, the claimant sent Ms Simmonds a letter, notifying her of a change to her medication and that she had suffered a slight relapse with her depression and anxiety symptoms [313]. In response, Ms Simmonds scheduled a face to face meeting with the claimant on the first available date, which was 27 May 2016.

38. On 26 May 2016, Ms Collis conducted an informal observation of the claimant's teaching. The feedback for this session is at [314 – 315].

39. On 27 May 2016 the claimant met with Ms Simmonds, with Ms Regan also present to discuss her letter of 15 May [323 – 326]. The claimant said her new anti-depressant medication made her feel better. Ms Simmonds asked how things were in the classroom and if any other support was needed. The claimant confirmed that her colleagues had been supportive, stating "Briony (Ms Nash) and Becky (Ms Hatton) have been very supportive. They know I take medication and get tired. We have tried to organise it so that I don't do things like moving the tables." Towards the end of the meeting, the claimant was asked by Ms Simmonds whether there was anything else she would like to raise and confirmed that there was not.

40. The claimant continued to carry out her work as usual, without raising any concerns or suggesting that she needed any additional support (in addition to that which was already in place for her benefit).

41. On 21 June 2016, a formal teaching observation of Ms Nash was conducted by Ms Collis [327 – 331].

42. On 24 June 2016, a formal teaching observation of the claimant was conducted by Ms Collis and Ms Miller. The latter was concerned with quality assurance of the School's monitoring and judgments. The latter was not told that the claimant had disabilities or that she had been off work. The lesson was graded as "requires improvement", the main areas of concern were related to health and safety matters. The claimant was provided with feedback in respect of this observation on 24 June 2016. The triangulation sheet [332 – 338], reflected the honest views of those observing her, and reflected the feedback that was given to her orally;

43. On 27 June 2016, the claimant commenced a further period of sickness absence. On 2 September 2016, the claimant submitted a formal grievance under the School's grievance policy [743 – 750]. The claimant's complaints were considered and investigated, in accordance with the School's grievance policy. By

a letter dated 20 September 2016, Marian Gerrett, a School Governor, confirmed that the claimant's grievance had been rejected [751 – 754]. Ms Gerrett rejected the claimant's call for disciplinary action to be taken against Ms Simmonds, finding that the claimant had been properly supported by management in her return to work. The claimant lodged an appeal against the grievance outcome on 11 October 2016 [755 – 767]. On 14 December 2016, the claimant was notified that her appeal had been unsuccessful [863 – 866]. Mr Worsfold, the Chair of Governors, concluded inter alia that the claimant had "been treated with respect and provided the support and reasonable adjustments at all times to which you are entitled in order to make a successful return to work."

SUBMISSIONS

44. The Tribunal heard detailed, well researched and well-presented submissions from both parties. Without intending any disrespect whatsoever to Counsel, these submissions are not repeated here.

LAW

45. The law was said not to be in dispute between the parties.

The burden of proof

46. The burden of proof provisions in relation to discrimination claims are found in section 136 of the Equality Act 2010 ("EqA").

47. The Court of Appeal, in **Igen Ltd v. Wong** [2005] ICR 931 CA, has authoritatively set out the position with regard to the drawing of inferences in discrimination cases in the light of the amendments implementing the EU Burden of Proof Directive.

48. In **Laing v. Manchester City Council** [2006] ICR 1519 EAT, the Employment Appeal Tribunal held that the drawing of the inference of *prima facie* discrimination should be drawn by consideration of all the evidence, i.e. looking at the primary facts without regard to whether they emanate from the claimant's or respondent's evidence page 1531 para 65. The question is a fundamentally simple one of asking why the employer acted as he did: **Laing** para 63.

49. That interpretation was approved by the Court of Appeal in **Madarassy v Nomura International plc** [2007] ICR 867 CA at paragraph 69. The Court also found at paragraphs 56-58 that 'could conclude' must mean 'a reasonable tribunal could properly conclude' from all the evidence before it. That means that the claimant has to 'set up a *prima facie* case'. That done, the burden of proof shifts to the respondent (employer) who has to show that he did not commit (or is not to be treated as having committed) the unlawful act, at page 878.

50. Tribunals should be careful not to approach the **Igen** guidelines in too mechanistic a fashion (**Hewage v. Grampian Health Board** [2012] ICR 1054 SC para 32, **London Borough of Ealing v. Rihal** [2004] EWCA Civ 623 para 26).

51. The Court of Appeal has confirmed the foregoing approach under the EqA in **Ayodele v. Citylink** [2018] IRLR 114 CA.

52. In the context of reasonable adjustment claims, the burden is on the claimant to establish both the fact of the alleged PCP(s) and the substantial disadvantage said to arise in consequence thereof: see for example **Bethnal Green & Shoreditch Educational Trust v. Dippenaar** [2015] UKEAT/0064/15, at paras. 40 – 42.

Direct discrimination

55. Section 13 provides:

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

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex—

(*a*) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(*b*) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(*a*) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

53. Direct discrimination assumes a comparison as between the treatment of different individuals. To make that comparison, however, the cases of complainant and comparator must be such that there must be no material difference between the circumstances relating to each case, section 23 of the Equality Act 2010. In either case, because direct discrimination occurs if the complainant is treated less favourably than the employer treats or 'would treat' another person, the comparator may be real or hypothetical.

Discrimination arising from disability

54. Section 15 EqA provides as follows:

"(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."

55. With regard to the meaning of "unfavourable treatment", "Unfavourably" must be interpreted and applied in its normal meaning; and a claimant cannot succeed by arguing that treatment that is in fact favourable might have been even more favourable: **Williams v. Trustees of Swansea University Pension and Assurance Society** [2018] ICR 233 CA para 50 which approved the approach of the Employment Appeal Tribunal which considered that the use of the word "unfavourably" was a deliberate choice in the legislation, and it should not be equated with the concept of detriment or less favourable treatment. The Employment Appeal Tribunal held that the meaning of unfavourably could be derived from the manner in which it is applied in section 18 of the EqAct, in which it means "placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person."

56. It is for a claimant to identify, with sufficient precision, what the "something arising in consequence" of their disability / disabilities is said to be; and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of a disability: see **Pnaiser v. NHS England** [2016] IRLR 170, at para. 31 (d):

> "The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in **Hall v. Chief Constable of West Yorkshire Police** [2015] IRLR 893), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability."

57. The EHRC Code explains, at paragraph 5.9:

> "The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. **The consequences will be varied and will depend on the individual effect upon a disabled person of their disability.** Some consequences may be obvious, such as an inability to walk unaided or inability to use certain work equipment. Others may not be obvious, for example having to follow a restricted diet." [Emphasis added]

58. The foregoing may be illustrated by reference to the original draft version of the EHRC Code which provided the following inexhaustive list of examples of the sort of things commonly arising in consequence of disabled persons' disabilities, namely: An inability to work unaided; a need for regular rest breaks or toilet breaks; restricted diet; slower typing speeds; regular hospital appointments; difficulties in using public transport; a need for specialist computer equipment and a need for

private and/or quiet working environment. The example given in paragraph 5.9 of the EHRC Code illustrates the point: A woman is disciplined for losing her temper at work. However, this behaviour was out of character and is a result of severe pain caused by cancer, of which her employer is aware. The disciplinary action is unfavourable treatment. This treatment is because of something which arises in consequence of the worker's disability, namely her loss of temper. There is a connection between the "something" (that is, the loss of temper) that led to the treatment and her disability.

59. In the event that the Tribunal finds that there has been unfavourable treatment of the clamant, it must consider what caused that treatment – more specifically, was the treatment "because of something arising in consequence of disability" (i.e. applying the 'reason why' analysis, as is familiar in the context of direct discrimination claims)?

60. The correct approach to the 'first stage' of a section 15 EqA claim was outlined by the EAT in **Basildon & Thurrock NHS Foundation Trust v Weerasinghe** [2016] ICR 305, in which Langstaff P held (at paras. 26 – 27):

> "26 The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The tribunal has first to focus on the words "because of something", and therefore has to identify "something"—and second on the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages. In addition, the statute requires the tribunal to conclude that it is A's treatment of B that is because of something arising, and that it is unfavourable to B. I shall return to that part of the test for completeness, though it does not directly arise before me.
>
> 27 In my view, it does not matter precisely in which order the tribunal takes the relevant steps. It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by "in consequence of", and thus find out what the "something" is, and then proceed to ask if it is "because of" that that A treated B unfavourably. It might equally ask why it was that A treated B unfavourably, and having identified that, ask whether that was something that arose *in consequence of B's disability."*

The Justification Defence Was reliance on observation a proportionate means of achieving a legitimate aim?

61. The EqA provides that the employer can rely on the justification defence under three sections; section 19(2) (indirect discrimination); 13(2) (direct age discrimination) and section 15(1) – as is the case here. The test is common across all jurisdictions to which it applies.

62. The Tribunal must balance any discriminatory effect (as it has identified) against the legitimate aims being pursued by the employer. The relevant principles are discussed in **Seldon v. Clarkson Wright and Jakes** [2012] IRLR 590; **Homer v. Chief Constable of West Yorkshire Police** [2012] IRLR 601; and **Harrod v. Chief Constable of West Midlands Police** [2017] IRLR 539.

63. In **Seldon v. Clarkson Wright and Jakes** [2009] IRLR 267 EAT which was affirmed by the Court of Appeal and Supreme Court although this point does not appear to have been argued before them, it was said at paragraph 73:

> "73. We do not accept the submissions of the appellant, and indeed repeated by the Commission, that a tribunal must always have concrete evidence, neatly weighed, to support each assertion made by the employer. Tribunals have an important role in applying their common sense and their knowledge of human nature. So, to take an example from this case, it seems to us plain that it will assist retention of associates, at least to some degree, that they know that partners are going to have to retire at a particular age. It is also self-evident, we think, that it will assist forward planning, particularly in relation to the operation of particular departments, to have the predictability of knowing when a partner will leave. It does not need a business planner to give evidence about that. Tribunals must, no doubt, be astute to differentiate between the exercise of their knowledge of how humans behave and stereotyped assumptions about behaviour. But the fact that they may sometimes fall into that trap does not mean that the tribunals must leave their understanding of human nature behind them when they sit in judgment."

64. In addressing the justification defence, the ET requires to address two questions, serially:

(i) Can the respondent establish that it was pursuing a legitimate aim?
(ii) Can the respondent establish that the measures taken to achieve that aim were appropriate and proportionate?

The Legitimate Aim Relied on by the Respondent

65. These were narrated at the commencement of the hearing as:

a. seeking to monitor and assess levels of performance / teaching standards;
b. seeking to improve standards of performance / teaching provision;
c. seeking to promote best practice;
d. seeking to identify strengths and areas in respect of which improvements could be attained, and communicating them to the teacher concerned;
e. seeking to identify areas in respect of which further support or assistance may be beneficial to the teacher concerned;
f. seeking to improve or maintain standards of education and learning for the children.

Reasonable adjustments (sections 20 and 21 of the Equality Act 2010)

66. Section 20 (3) EqA imposes the following obligation on employers:

> "…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."

67. Schedule 8, part 3, para. 20 (1) EqA provides as follows:

> "A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—
>
> (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;
> (b) in any other case referred to in this Part of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."

68. The recommended 'structured approach' to resolving claims of this nature was set out by the EAT in **Secretary of State for Work and Pensions (Job Centre Plus) v. Higgins** [2014] ICR 341, as follows:

> **"**29 In a case where, as here, the employer is alleged to be in breach of the duty to make reasonable adjustments imposed by section 20(3) of the 2010 Act, the tribunal should identify (1) the employer's provision, criterion or practice ("PCP") at issue, (2) the persons who are not disabled in comparison with whom comparison is made, and (3) the nature and extent of the substantial disadvantage suffered by the employee. Without these findings the tribunal is in no position to find what (if any) step it is reasonable for the employer to have to take to avoid the disadvantage.
> 30 These requirements flow from the statutory wording. This wording has changed slightly from the wording in the preceding Disability Discrimination Act 1995, in respect of which the Employment Appeal Tribunal emphasised the importance of such an approach: see *Environment Agency v Rowan* [2008] ICR 218, paras 26–27 (Judge Serota QC). The guidance in *Rowan* remains apposite: tribunals should give careful consideration to, and make findings concerning, each element of the statutory provision which is engaged in the case before it. Eliding different elements within the statutory definition, or failing to make clear findings concerning each element, leads to difficulty. Elements may differ in their importance from case to case, but it is good discipline to state conclusions on them even if the conclusions appear obvious.
> 31 We would add one further point. The duty to make an adjustment is a duty to take a "step" or "steps" to avoid the disadvantage. Just as the tribunal should expect to identify the PCP, the comparators and the nature and extent of the substantial disadvantage, so it should expect to identify the step or steps which it was reasonable for the employer to have to take to avoid the disadvantage."

69. With regard to the issue of knowledge, in **Wilcox v. Birmingham CAB Services Limited** [2011] UKEAT/0293/10/DM, the EAT confirmed (see para. 37, *per* Underhill P) that an employer is only under a duty to make reasonable adjustments if:

> a. the employee is disabled;
> b. the employee is placed at a substantial disadvantage (in comparison with non-disabled employees) as a result of the application of the PCP under consideration; and
> c. the employer knows, or ought reasonably to have known, both of the above matters.

70. Finally, in **RBS v. Ashton** [2011] ICR 632, the EAT (*per* Langstaff J) held at paras. 14 – 15:

> "14. A close focus upon the wording of 3A(2), 4A and 18B[1] shows that an Employment Tribunal - in order to uphold a claim that there has been a breach of the duty to make reasonable adjustments and, thus, discrimination - must be satisfied that there is a provision, criterion or practice which has placed the disabled person concerned not simply at some disadvantage viewed generally, but at a disadvantage which is substantial and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled.
>
> 15. The duty, given that disadvantage and the fact that it is substantial are both identified, is to take such steps as are reasonable to prevent the provision, criterion or practice (which will, of course, have been identified for this purpose) having the proscribed effect - that is the effect of creating that disadvantage when compared to those who are not disabled. It is not, therefore, a section which obliges an employer to take reasonable steps to assist a disabled person or to help the disabled person overcome the effects of their disability, except insofar as the terms to which we have referred permit it."

71. The Court of Appeal in **Newham Sixth Form College v. Sanders** [2014] EWCA Civ 734 at para 9 endorsed what was said in **Royal Bank of Scotland v. Ashton** that when considering the question of reasonable adjustment, it is critical to identify the relevant PCP concerned and the precise nature of the disadvantage which it creates by comparison with its effect on the non-disabled. The importance of this is that until the disadvantage is properly identified, it is not possible to determine what steps might eliminate it.

The PCPs relied on

72. It is only when the 'provision, criterion or practice' has been identified that it is possible to define the 'pool' of comparators for the purpose of seeing whether there has been the requisite substantial disadvantage of the disabled person in comparison to the non-disabled.

Comparators

73. Whereas in indirect disability discrimination claims, claimants need to show that people with their disability are (or would be) disadvantaged as a group compared with those who do not have that disability, which will usually require a statistical analysis of 'advantaged' and disadvantaged' groups; in contrast, the concept of group disadvantage has no place in a reasonable adjustments claim. The analysis is simply whether the PCP puts the disabled claimant at a substantial disadvantage compared to people without that disability.

74. In the present case, the Tribunal considered that the cpmparator group is teachers of the respondent who are not disabled and thus would be able to fulfil their teaching obligations.

Substantial disadvantage

75. The tribunal must identify clearly the nature and extent of the disadvantage suffered, because in the absence of such findings, it will be unable to determine properly what adjustments would have been reasonable. Stated shortly, reasonable adjustments must help the employee return to work; the Employment Appeal Tribunal made the point in **Salford NHS Primary Care Trust v. Smith** UKEAT/0507/10 at paragraph 47 that:

> "Reasonable adjustments are **limited to those that prevent the PCP or feature placing the disabled person concerned at a substantial disadvantage** in comparison with persons who are not disabled. Reasonable adjustments are **primarily concerned with enabling the disabled person to remain in or return to work** with the employer."

DISCUSSION

76. The Tribunal considered the evidence and correspondence in mid-2015 in relation to the application of the capability procedure and the call to a stage 3 meeting and the ultimate resolution of the issue. This was not because there was a specific issue relating to that part of the case but because the claimant submitted that therein lay the seeds of her subsequent treatment by the School. The School had tried to "get her out" then and the course of conduct after her phased return to work was also intended to "get her out" of the School. The respondent submitted that the use of the procedure was a paradigm example of good practice. The Tribunal did not view the use of the procedure in the same way as the respondent. The Council did come to the appropriate position eventually, but it did seem to involve a lot more difficulty and a lot more serious attention from the claimant's solicitor than one might have expected. As Ms Regan was involved on behalf of the School at this stage, the Tribunal kept her involvement in mind when considering her evidence in the later stages of the case where it was relevant.

77. The Tribunal considered all of the issues against this background and addressed issues 5, 6 and 7 and then the issues concerned with teaching observations separately and together.

Issue 5: the allegation that C was expected to be "resilient to change"

78. The Tribunal pondered what the claimant meant when she said that she was expected by the respondent to be "resilient to change", or "as resilient to change as other staff". There was general evidence that the staffing of the Reception class had changed. The managers clearly understood that the claimant had a fear of the unexpected and that this involved her interaction with parents but the description of resilient to change or a variant of it does not fit the facts at all. The claimant was protected from any change throughout the entirety of her phased return to work during 2015, so the Tribunal took it that if there was a PCP, it applied from January onwards. By this stage, the claimant was still being given considerable support by managers who knew and understood her difficulties. The Tribunal determined that no such PCP was applied.

79. Even if the PCP was applied, the Tribunal could not determine what substantial disadvantage the claimant was put at, as a consequence of this alleged PCP. She points to the respondent's referral to Occupational Health in December 2015, in which the following question was posed by Ms Simmonds:

> "Susie's anxiety and depression was detailed in the last OH report and in recent meetings with Susie she is still experiencing difficulties in this area, particularly when dealing with the unknown. The school has so far protected Susie from change and the unknown, but this will not be able to be managed when she has fully returned as it is part of the responsibilities of the role holder. Please can you advise the current prognosis, including any impact on her ability to perform her role?" [422] (emphasis added by the claimant)

80. Ms Simmonds was questioned about what she meant by this and seemed to say that the issue would have to be addressed. The Tribunal did not take this as meaning that the claimant could not be retained in employment, rather the School managers would have to see how matters turned out at that stage.

81. The claimant's specific complaint is that she was deprived of formal 'link' review meetings from 19 January 2016 onwards, against her will. The Tribunal has found as a fact that this did not happen. It can also be seen that they might have outlived their usefulness by January. The "buddy" meetings stopped. Ms Collis saw the claimant every day in the Reception class and enquired either generally or in particular how she was. If the claimant had not been able to confide in Ms Collis then she could have arranged another time for a meeting. The Tribunal found that the claimant did not suffer any disadvantage from the application of the PCP, if there was one.

Issue 6: the allegation that the claimant was expected to take "lead responsibility in the job share arrangement"

82. In the Preliminary Hearing Judgment, at paragraph 14.5 [54], Employment Judge Baron recorded that this allegation "is said to be a continuing requirement which had evolved over time rather than as a result of a specific decision." In her oral evidence, the claimant confirmed that no one had ever actually said to her, whether orally or in writing, that she was expected to take lead responsibility for the job share arrangement.

83. The claimant accepted that she was not 'above' Ms Nash in terms of the school hierarchy. The claimant did not suggest or complain to the School's management that she felt that Ms Nash was not pulling her weight, in terms of sharing the load in the job share arrangement. Nor did the claimant ever suggest or complain that she felt unable to cope with the way in which the teaching responsibilities were being distributed or shared between her and Ms Nash. Indeed, on several occasions, the claimant expressed her contentment with the job share arrangement and how things were working in practice.

84. The claimant founds on the absence of a written job share arrangement as noted by Ms Regan as a very significant factor in the emergence of the expectation that the claimant would take lead responsibility. The claimant and Ms Nash seemed to get ahead and make their own arrangements which worked satisfactorily thus obviating the need for a written agreement.

85. The respondent was aware that the claimant did not feel able to undertake a leadership role and had stated that she would prefer to concentrate on developing her teaching and classroom organisation skills rather than jeopardising

her health through having a managerial workload. The School had permitted her to relinquish her leadership role.

86. The Tribunal find that the alleged PCP was not applied to the claimant, at any time following her return to work in October 2015. Accordingly, the claim must fail.

Issue 7: The claimant's UPS 2 responsibility for school clubs

87. The claimant was paid as a UPS 2 level teacher. The claimant's UPS 2 target was agreed in consultation with her. At no time did she express any objections or reservations in respect of this target. The target which was agreed with her was much more straightforward and less onerous than what would ordinarily be expected of, and assigned to, UPS 2 level teachers.

88. As a responsibility of the pay grade, the additional duty does constitute a PCP however, the Tribunal could not determine what specific disadvantage the claimant suffered, she either carried out the fairly limited tasks or did not, nothing arose in consequence either way.

Issues 1, 4 (a), 8 and 9: the 15 April 2016 observation

89. The Tribunal carefully considered the evidence surrounding the panic attack on 16 March in order to determine whether the scheduling of a planned observation the next day caused or contributed to the attack and whether the respondent should have responded differently to the way it did. The respondent is criticised for taking no measures to investigate the cause of the panic attack or determine what steps might be taken to support the claimant other than a standard return to work meeting.

90. The 15 April 2016 observation was a rescheduled observation, following the cancellation of the claimant's observation that had originally been scheduled for 17 March 2016. By this time, the claimant had been back at work for a period of six months. The claimant was aware of the date of the rescheduled observation for approximately one month and had ample time to prepare for it.

91. The claimant did not request that this observation be postponed or rescheduled again or suggest that she felt disadvantaged in any way by the observation being conducted on that date or at that time.

92. The Tribunal determined that it was a PCP for the School to carry out its rota of observations to include the claimant, however the claimant does not complain about the manner in which the observation itself was conducted.

93. The Tribunal finds that both Ms Simmonds and Ms Collis provided constructive feedback, both positive and negative, in a courteous, supportive and professional manner. The Tribunal could not identify what the substantial disadvantage was. The Tribunal does not find this to be a punitive measure and there was no sanction as a result of this observation. It is difficult to see what else the respondent should have done in relation to the normal arrangements for

observing teachers in class, absent any link being made between the projected observation and the panic attack by the claimant.

94. With regard to the claimant's section 15 claim, the Tribunal could not identify which specific criticisms / pieces of feedback in respect of her teaching on 15 April 2016 were being relied upon, nor on what basis such criticisms are said to have been caused by something arising from her disabilities. An examination of the triangulation sheets demonstrates that the concerns arose from issues which were unaffected by her disabilities.

95. This equally applies to the feedback in respect of the claimant's 24 June 2016 observation, or the manner in which that feedback was provided.

96. Even if the section 15 claim had been established thus far, the provision of feedback to the claimant in respect of her 15 April 2016 observation was objectively justified. Even without the claimant's concession under cross-examination that:

a. the feedback that was provided to the claimant reflected the honest views of Ms Simmonds and Ms Collis; and

b. where areas for improvement were identified by the observers, they were duty bound to share that feedback with her.

the respondent's conduct was a proportionate and lawful means of achieving these legitimate aims.

97. It is alleged that the claimant was treated less favourably than Ms Nash in that she was criticised in an unduly harsh manner on 15 April 2016 and she was subjected to further observation which constituted direct disability discrimination.

98. The Tribunal considered that Ms Nash is not an appropriate comparator notwithstanding she was a teacher in the same job as the claimant, working the same classroom and bearing the same level of responsibility for the success of the class. The fact that Ms Nash was part time is not material but her observation had been better and different to that of the claimant and it cannot be said that Ms Nash was treated more favourably by the respondent because she was not suffering from the claimant's disabilities.

99. In the period March to June 2016, Ms Nash was observed on four separate occasions, whereas the claimant was observed on three occasions. The reason why Ms Nash was not put on a PDP was because, based on her performance, her teaching was found to be 'good' and therefore not in need of a PDP whereas the claimant's teaching was found to be requiring improvement. These different assessments had nothing whatsoever to do with the fact that the claimant is a disabled person.

Issues 2 and 4b: requirement to undergo additional observations

100. The reason why Ms Collis informally observed the claimant's teaching on 26 May 2016 was to check how she was getting on, having regard to the areas for development that had been identified in the PDP, in consultation with her, following on from the 15 April 2016 observation. This was a supportive measure for the claimant and not unfavourable treatment.

101. The reason for conducting the 24 June 2016 observation was that it formed part of the School's general and school-wide cycle of 'scrutinised' management assessments. The Tribunal considered that the School was correct not to give Ms Miller any detail as to the Claimant's disabilities or reasonable adjustments.

102. In issue 4 (b), The Tribunal does not consider Ms Nash to be a suitable comparator for the reasons given for Issue 4(a).

Issue 3: the 24 June 2016 observation

103. The claim of discrimination related to disability applies to the content of the feedback following the observation. The Tribunal does not accept the criticism made by the claimant of the content of the feedback. The content, based on the triangulation sheet, concerned the claimant's teaching and was not unfavourable treatment nor did it arise in consequence of her disabilities. In any event, the School was pursuing a legitimate aim in a proportionate way.

CONCLUSION

104. The Tribunal did not accept that the senior management of the School was seeking to manage the claimant out of her employment because it did not wish to bear the burden of supporting her disabilities or to risk the potential threat to the school's grading which they presented. The management of the School did everything it could do in assisting the claimant in her phased return to work as is acknowledged by the claimant who was appreciative of the efforts made by her work colleagues as can be seen from contemporaneous text messages. This approach did not change in the period after January. The Tribunal was particularly impressed by the evidence of Ms Collis and find her evidence to be thoroughly reliable and further find she acted in support of the claimant with empathy, kindness and understanding throughout the period being examined. This is not to suggest that Ms Simmonds and Ms Regan behaved otherwise.

105. The claimant's claims of disability discrimination are dismissed.

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Employment Judge Truscott QC

Date 27 March 2018