Appeal No. UKEAT/0196/18/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 21 February 2019
Judgment handed down on 29 March 2019

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

MR F AHMED — APPELLANT

THE CARDINAL HUME ACADEMIES — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Mr Marcus Pilgerstorfer (of Counsel) Instructed by: Bar Pro Bono Unit
For the Respondent	Ms Karen Moss (of Counsel) Instructed by: DAS Law Ltd North Quay, Temple Bach Bristol BS1 6FL

SUMMARY

DISABILITY

HARASSMENT

The Claimant has dyspraxia. This causes the Claimant to have difficulties with handwriting. The Claimant also suffers from pain when handwriting and can only write for a few minutes at a time. He qualified as a "Teach First" teacher and was appointed to teach at the Respondent's School. However, at a meeting on 7 September 2016, the Headteacher, Mr Rowland expressed surprise at his difficulty with writing and made remarks which the Claimant perceived to amount to harassment related to disability. On 8 September 2016, the Claimant was told that he would be suspended and required to stay at home until the issues raised were considered further. The Claimant raised a grievance and subsequently resigned claiming that he had been the victim of direct disability discrimination and harassment. The Tribunal dismissed his claims finding that it was not reasonable in the circumstances for Mr Rowland's conduct to be regarded as constituting harassment.

The Claimant appealed on the ground that the Tribunal had taken the wrong approach to harassment in that it had treated the question of whether it was reasonable for the impugned conduct to have the proscribed effect as determinative, whereas s.26(4), EqA merely required each of the factors (i.e. perception, circumstances and reasonableness) to be taken into account. The Claimant also contended that the Tribunal had erred in relation to his claim of direct disability discrimination in failing to give effect to its own finding that the reason for the Claimant's suspension was his disability, namely his difficulty in handwriting.

Held: Appeal dismissed. As to the first ground, the Tribunal had not erred in its approach to harassment. It had applied the approach set out in Pemberton v Inwood [2018] ICR 1291 which was that if it was not reasonable for the conduct to be regarded as violating the Claimant's

dignity or creating an adverse environment for him, then it should not be found to have done so. As to the second ground, the Tribunal had not misapplied its own findings. Its conclusion was that he had been suspended because of his difficulties with handwriting. That was a finding that treatment was because of the adverse effect of an impairment or of something arising from disability; it was not a finding that the treatment was because of the disability – whether dyspraxia or some other unspecified physical or mental impairment - itself.

THE HONOURABLE MR JUSTICE CHOUDHURY

1. The Appellant, to whom I shall refer as the Claimant, as he was below, appeals against the decision of the Central London Employment Tribunal ("the Tribunal") dismissing his claims of discrimination, harassment and unfair constructive dismissal. The appeal is primarily concerned with the correct approach to determining whether there has been harassment within the meaning of s.26 of the **Equality Act 2010** ("EqA").

Background

2. The Claimant has dyspraxia. This causes the Claimant to have difficulties with reading, comprehension speed and handwriting. In particular, the Claimant has difficulty writing for more than a few minutes due to pain in his hands.

3. The Claimant has a background in business and investment/financial markets. However, he decided to retrain as a teacher through the "Teach First" scheme, which provides graduates with no teaching experience the opportunity of achieving qualified teacher status on a fast-track basis. The Claimant applied to the scheme in early 2016. In doing so, he made his disability and its effect on his abilities clear. On 6 June 2016, Mr Scudamore of Teach First offered the Claimant a placement with the Respondent school. The Claimant accepted that offer on 23 June 2016.

4. During subsequent communications with his subject mentors and the school, the Claimant continued to make clear his disability and the extreme difficulty that he has with handwriting. He requested the ability to teach using PowerPoint and a projector.

5. On 15 August 2016, the Claimant had a consultation with the Respondent's occupational health doctor, Dr Lubin. Dr Lubin produced a report in which the Claimant was certified fit for the proposed post of Teach First teacher. Dr Lubin also

highlighted the issues the Claimant would have with handwriting, amongst other things, and recommended the need for an overall risk assessment. He further expressed the view that the Claimant's condition of dyspraxia was likely to fall within the terms of EqA.

6. Mr Tissot, Chief Executive of Respondent, considered Dr Lubin's report and became concerned as to whether the Claimant would be able to cope and about what adjustments should be made. Mr Rowland, headteacher at the school, considered Dr Lubin's report on 5 September 2016. He too became concerned about the Claimant's ability to cope with the demands of the role, and discussed the matter with Mr Tissot. Mr Tissot considered that they needed more time to reflect on the issue, and to discuss with others the nature of the Claimant's disability and the reasonable adjustments that would need to be made, in order to find the best way forward.

7. On 6 September 2016, Mr Rowland sent an email to Mr Scudamore expressing grave concerns about the Claimant's ability to undertake the role of Teach First teacher on a number of fronts.

8. There then followed the two meetings with the Claimant that form the key subject matter of this appeal. On 7 September 2016, the Claimant met with Mr Rowland. The Tribunal describes this meeting as follows:

> **"19. On the 7 September, the Claimant and Mr Rowland met together, during which Mr Rowland explored each of his concerns in turn, beginning with the commuting issue and continuing through the issues of the Claimant's back and knee conditions and on to dyspraxia. The Claimant stated that Mr Rowland proceeded to insensitively interrogate him in a very negative and unconstructive manner about his learning disability and was dismissive of any of his own suggestions about how to overcome the writing issue. He said that he had found Mr Rowland's manner hostile, demeaning and unwelcome. Mr Rowland denies that he insensitively interrogated the Claimant in a negative or unconstructive manner or that he was dismissive of his suggestions. He did however state that he was alarmed at the meeting when the Claimant said he could hardly write for more than a couple of minutes, due to severe pain, and said that he needed to question how the Claimant was going to cope with the job. He told the Tribunal that he was in shock and had a lot to think about and that although the Claimant did not believe that his disability would be an issue, he Mr Rowland, had been 31 years in the job and he thought that it was definitely an issue.**

> **20. As to the content of the meeting, the Tribunal had before it Mr Rowland's note taken thereafter and notes made by the Claimant on his journey home by tube and train, which were more detailed. However, there was no substantive dispute in relation to the content of the meeting. As to the manner, the Tribunal concluded that Mr Rowland had not been aggressive but that he had been rattled and alarmed. With commendable honesty Mr Rowland told the Tribunal that he had been sceptical because for him not being able to write as a teacher was a bombshell. He said "I am a chalk and talk old school teacher and I am not convinced by technology because I don't know how to do it." He accepted that his shock and scepticism may well have informed how he came across at the meeting, but denied being negative or dismissive as the Claimant alleged. He stated that he had never before come across a teacher who could not write."**

9. Shortly after the meeting, the Claimant sent a message via instant messaging to his mentors, Mr Henry and Ms Rosen. The Claimant described the meeting with Mr Rowland stating that he had been dismissive of the occupational health doctor's judgment that he was fit to teach. The Claimant further commented that "the conversation was civil of course". The Claimant had contended before the Tribunal that he had only said that in order to be diplomatic with his mentors so early in his job. However, the Tribunal did not accept that this was said only in order to be diplomatic, and took that comment made by the Claimant into account in determining whether there had been harassment.

10. Following the meeting on 7 September 2016, Mr Rowland and Mr Tissot had a long conversation about what happened. They agreed that they needed more time to consider the Claimant's difficulties and how best he could be supported. They decided that the best course was for the Claimant to stay at home and not teach whilst these matters were being considered.

11. The next day, 8 September 2016, the Claimant pointed out to Ms Rosen that Mr Rowland's "line of questioning, possibly including that of my integrity, was highly likely to be in breach of disability discrimination legislation." That message was shown to Mr Rowland before he met again with the Claimant later that day.

> **At 3:30pm on 8 September 2016, the Claimant had a further meeting with Mr Rowland. This meeting was also attended by Ms Adams, Deputy PA to the Headteacher, as notetaker. The meeting on 8 September 2016 is described by the Tribunal as follows:**

> **"24. On the 8 September at 3.30pm, the Claimant had a further meeting with Mr Rowland, also attended by Ms Adams as note taker. Again, the content of this meeting as between Ms Adams' notes and those written subsequently by the Claimant were broadly not in dispute. The Claimant said that it appeared to be a reiteration of the points made on the previous day, but that he himself was more assertive in his own defence. Mr Rowland said that the Claimant was amicable but came across as rather aggressive. Ms Adams' notes state; that Mr Rowland said that the main issue was with the Claimant not being able to write and that until he had received advice he did not see how the Claimant would be compatible with a teaching post, due to his writing issue; that he would continue the Claimant's employment contract but would suspend him while a final decision was being made and that the Claimant agreed to stay at home until he heard from the School. According to the Claimant's notes Mr Rowland said "we are going to ask you not to teach until we reach a decision about your position at the school" to which the Claimant said "are you saying I am suspended" to which Mr Rowland replied "no, its more like garden leave". The Claimant asked "am I to stay at home?" to which Mr Rowland answered; "yes". The Claimant then asked; "do I have a choice?" Mr Rowland said; "no, we have not reached a decision yet, we are taking advice, I am sat on the fence". The Claimant's notes add that Mr Rowland stated that it was 'a neutral act, before we reach a decision and that the decision would be quickly made'. The Claimant stated in evidence that he was absolutely shocked and could not believe that the School had the audacity to suspend him for a disability, apparently holding the view that he should not be in a teaching position at all. He believed that Mr Rowland and Mr Tissot intended to terminate his contract of employment.**
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> **25. On the 9th September Mr Rowland wrote a letter to the Claimant saying that "following concerns over issues with writing, you have been suspended from School. The suspension is a neutral act to enable the School to seek advice and come to a decision about your training position at this School". Also on the 9th September, the Claimant received a reply to a query from Nick Ward at Teach First confirming that they had not shared with the School the information which the Claimant had put into his personal information form about dyspraxia as it was not common practice to share any such private information with the Schools. Also on the 9th September, the Claimant wrote to Ms Adams requiring information including the typed notes and union representation details. The Claimant also wrote to Celia Silva the in-school NUT Union Representative."**

12. On 13 September 2016, Mr Rowland wrote to the Claimant informing him that his suspension would cease on 16 September 2016, and that he should come into work on Monday, 19 September 2016, when Mr Tissot would meet him at 9.00am in his office. Prior to that meeting, Mr Rowland and Mr Tissot met with Mr Scudamore. Mr Tissot expressed the view that the Claimant might be better suited to switching to the "Schools Direct" scheme, an alternative teacher training programme. He felt that the Schools Direct scheme would facilitate the best support for the Claimant since teachers on that programme did not have sole responsibility for their classes. It was common ground that

A the Schools Direct route was considered to be less prestigious than Teach First and did not lead to the same qualifications.

13. On 19 September 2016, at 5.18am, the Claimant submitted a formal grievance by email B on the grounds that he had been discriminated against by Mr Rowland and Mr Tissot. The Claimant's particular complaints included a complaint that he had been subjected to harassment by Mr Rowland insensitively interrogating him during the meeting on 7 C September 2016, and that he had been suspended by Mr Tissot and Mr Rowland on 8 September 2016 without reasonable grounds.

14. Later that same morning, the Claimant sent a letter of resignation to the school. He D complained in this letter that the school's Headteacher had acted in a discriminatory manner towards him regarding his dyspraxia and related handwriting difficulties, that he had been the subject of harassment by Mr Rowland's line of questioning on 7 E September 2016, and that the decision to suspend him was unnecessary. He regarded himself, by reason of these matters, as having been constructively dismissed.

15. The Claimant's grievance was not upheld and nor was his appeal against that grievance F decision. The Claimant presented his complaints to the Tribunal on 18 December 2016.

16. The issues to be determined at the full hearing were identified at a case management preliminary hearing held before Employment Judge Tayler on 12 June 2017. At that G hearing, the Claimant was permitted to amend his claim form to claim that difficulty with handwriting, including hand pain, was an impairment. At a further preliminary hearing before Employment Judge Goodman on 15 September 2017, it was determined H that:

> **"The Claimant was disabled by reason of difficulty with handwriting, including hand pain."**

The Tribunal's Judgment.

17. The Claimant, who was at that stage studying for a graduate diploma in law, represented himself at the hearing, whilst the Respondent was represented by Counsel. The Tribunal, having set out the facts and the law, proceeded to set out its conclusions in respect of the various issues identified. In relation to the claim of harassment under s.26 of EqA, the Tribunal held as follows:

> **"45. Harassment under section 26 of the Equality Act 2010: The Claimant states that Mr Rowland insensitively interrogated him as to his disability in a negative, dismissive and hostile manner at their meeting on 7 September and was dismissive of all of his suggestions. He contends that this created an intimidating, hostile, humiliating or offensive environment for him, so as to constitute harassment related to his disability. The Respondent does not dispute that what was said at both meetings, on 7 and 8 September, was related to the Claimant's disability.**
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> **46. The Tribunal found on the evidence before it, as set out in paragraphs 19 to 21 of these Reasons, that at their meeting on 7 September Mr Rowland was shocked to learn that the Claimant was unable to write for more than a minute or two due to severe hand pain and he could not believe, from his experience, that a teacher could function in the classroom and in marking pupils' work without being able to write. He was sceptical about the Claimant's IT suggested solutions, stemming from his own ignorance of IT. He accepted that he was rattled by the discovery and that his scepticism no doubt informed his manner at the meeting. However, the Tribunal found that he was not aggressive and noted that the Claimant's own reporting of the meeting to his mentors, that evening, stated that the "conversation was civil, of course". The Tribunal did not accept that the Claimant would have been diplomatic in this reporting to the extent of concealing aggression or harassment, since he was subsequently forthright in his communications with Mr Pittendreigh and Ms Adams, on 13 and 14 of September.**
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> **47. The Tribunal accepted that Mr Rowland's conduct on 7 September was certainly unwanted by the Claimant. However, the circumstances were that the headmaster was profoundly concerned about whether a new and inexperienced teacher, who was unable to write for more than a minute or two, was able to undertake sole responsibility, beginning the following week, for 9 different classes (18 hours) of 14 to 18-year-old pupils who were preparing for public examinations. The Tribunal accepted that Mr Rowland had a responsibility for the education of these pupils, as well as for the welfare of his teachers, and Mr Tissot stated that in his view, given the gossipy nature of schools, to allow the Claimant to start off as their business studies teacher and then have to pull him out and replace him with someone else, as yet unspecified, would be disruptive for the pupils and potentially humiliating and embarrassing for the Claimant himself.**
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> **48. The Tribunal concluded therefore that in all the circumstances it was not reasonable for Mr Rowland's questioning and manner at the meeting of 7 September to be regarded as constituting harassment, within the meaning of section 26(4) of the Equality Act 2010.**

49. As to the suspension meeting on 8 September, Ms Adams told the Tribunal that she remembered the meeting being quite civil and that she did not come out of the meeting feeling surprised or uncomfortable about the tone of the meeting. However, a minority of the Tribunal concluded that it was reasonable for the Claimant to feel, under section 26(4)(c) of the Act, that being suspended and told to go home, the second day after he had arrived, violated his dignity and that therefore his complaint of harassment should succeed. The minority of the Tribunal accepted that Mr Rowland had little choice but to send the Claimant home temporarily, in the circumstances, but not under "suspension", a term which imported notions of the Respondent's disciplinary process. The word 'suspension' was also used in Mr Rowland's formal suspension letter of 9 September.

50. The majority of the Tribunal concluded that it was not reasonable to regard the Claimant's sending home on suspension as amounting to harassment within the meaning of section 26(4)(c) of the Act, because; (i) The use of the word 'suspension' was unhelpful and inaccurate, in as much as it incorporated a term which was part of the Respondent's disciplinary procedure, as was the use of the phrase 'garden leave', in as much as it is capable of importing the notion of serving out one's notice away from the office. (ii) Mr Rowland told the Tribunal that he didn't understand this meaning of the term 'garden leave' at the material time and that he latched onto the word 'suspension' because he believed that this was the only procedural option available to him to make the Claimant stay at home, of which he was aware, the Claimant having refused to go home. (iii) Nevertheless, the Claimant's own notes of the meeting, as set out in paragraph 24 of these Reasons, make it clear that the substantive reality of what was being done was explained to him and that he understood it – namely that he was going to be at home on 'a sort of garden leave' whilst advice was taken and a decision reached about his position at the school – irrespective of the word 'suspension' being used, which he was also informed was a 'neutral act'."

18. As to the claim of direct discrimination, the Tribunal found as follows:

"51. Direct disability discrimination under section 13 of the Equality Act 2010: there were no facts found by the Tribunal from which it could find, in the absence of an alternative explanation, that the Claimant was suspended or that any proposal to move him from Teach First to the Schools Direct programme was because of his disability, per se. This claim must therefore fail."

19. Although not the subject of any ground of appeal, it is also relevant to note the Tribunal's conclusions in relation to the claim of discrimination arising from disability, contrary to s.15 EqA:

"52. Discrimination because of something arising from the Claimant's disability under section 15 of the Equality Act 2010: It is not in dispute that the Claimant was suspended because he was unable to write for more than a minute or two due to hand pain and that this arose from his disability. Being sent home while a decision was made, rather than being able to start taking his classes as planned, constitutes unfavourable treatment and it therefore falls to the Respondent to satisfy the Tribunal that it acted in pursuance of a legitimate aim and that its treatment of the Claimant was a proportionate means of achieving that legitimate aim."

In relation to the claim of constructive dismissal, the Tribunal considered each of the ten alleged breaches of contract relied upon by the Claimant. For present purposes, it is only necessary to refer to two of those alleged breaches, both of which allege a breach of the implied term of mutual trust and confidence resulting from

the alleged acts of harassment by Mr Rowland during the meetings on the 7 and 8 September 2016 and from the suspension:
"60.2 Harassment by Mr Rowland during the meetings on 7 and 8 September: As set out in paragraphs 49 and 50 above, the majority of the Tribunal concluded that the Claimant's complaint of harassment relating to these 2 meetings was not well-founded because, in all the circumstances, it is not reasonable to regard Mr Rowland's conduct as having the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading or humiliating environment for him. The use of the word 'suspension' was unfortunate and clumsy. However, it was clearly explained to the Claimant, according to his own notes of the meeting, that he was being sent home while it was urgently explored as to how he could take his classes. A minority of the Tribunal concluded that it was reasonable to regard Mr Rowland's conduct in sending him home under 'suspension' as violating his dignity, on only his second day in the school, and that this was a breach of the implied term of trust and confidence.

60.4 An unwarranted suspension without reasonable grounds – suspension was only available under the disciplinary policy, alternatively, no policy was used, which is still unreasonable: A majority of the Tribunal concluded that Mr Rowland's sending the Claimant home was warranted, because he refused to go home whilst the Respondent made inquiries into his capacity to take his classes without writing and, if necessary to arrange support/cover for his classes, rather than to allow him to start teaching and then potentially and at short notice have to pull him out and find a replacement. This latter possibility was seen by Mr Tissot and Mr Rowland as being highly undesirable for the pupils and also for the Claimant himself, as was having him sitting in the staffroom while they made their inquiries, where they feared that other staff and pupils would comment and draw inaccurate conclusions. The minority of the Tribunal accepted the necessity of sending the Claimant home to wait, but concluded that to do this under 'suspension', a word imported from the disciplinary policy, was a fundamental breach of the implied term of trust and confidence. The majority of the Tribunal regarded the use of the word 'suspension' as highly unfortunate and misguided on Mr Rowland's part but accepted that Mr Rowland had made it explicitly clear at the suspension meeting that it was 'a sort of garden leave' while advice was taken and a decision made and that it was a neutral act. The Claimant therefore, according to his own notes of the meeting, understood the underlying reality and that it was not a disciplinary situation. Mr Rowland mistakenly believed that he only had 'suspension' open to him, because that was the only procedure for sending someone home of which he was aware."

20. The Tribunal concluded, by a majority, that there was no fundamental breach of the implied term of mutual trust and confidence as alleged by the Claimant, whereas the minority of the Tribunal concluded that the Respondent's actions as set out in paragraph 60.2 of the reasons and 60.4, both individually and cumulatively, did constitute a fundamental breach of the implied term.

Legal framework

21. Section 13, EqA, so far as relevant, provides:

13 Direct discrimination

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…

22. The comparative exercise for the purposes of that section is to be carried out in accordance with s.23, EqA, which, so far as relevant, provides:

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.
(2) The circumstances relating to a case include a person's abilities if—
(a) on a comparison for the purposes of section 13, the protected characteristic is disability;

23. That means that in any comparison for the purposes of a claim of direct discrimination because of disability, the Claimant's and comparator's abilities must not be materially different.

24. In relation to harassment, s.26, EqA, so far as relevant, provides:

26 Harassment
(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
(2) A also harasses B if—
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).
…
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.
(5) The relevant protected characteristics are—
…
disability;
…

25. Guidance as to the application of this provision is set out in the judgment of ***Pemberton v Right Reverend Inwood*** **[2018] ICR 1291, [2018] IRLR 542**, in which the Court of Appeal considered whether the Employment Tribunal had been correct to conclude that the revocation of a Canon's Permission to Officiate at services, and the withholding of an Extra Parochial Ministry Licence, following the Canon's marriage to his same-sex

partner, did not constitute harassment within the meaning of s.26, EqA. Underhill LJ, having referred to the predecessor provisions to s.26, EqA and the judgment of the EAT in ***Richmond Pharmacology v Dhaliwal*** **[2009] IRLR 336**, which considered those provisions, stated as follows:

> **"87.One difference between the two sections is that in section 3A the conduct must be "on grounds of [the protected characteristic]" whereas in section 26 it need only be "related to" that characteristic. That may be a significant difference in some cases, and it means that element (3) in the analysis at para. 10 of my judgment in Dhaliwal, with the associated comments at para. 15, is redundant; but it is immaterial for our purposes, since it was accepted in the present case that the conduct complained of related to Canon Pemberton's sexual orientation.**
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> **88.The other difference is that, although section 26 (2) has the same three elements as section 3A (2) (in short: B's perception; the "circumstances"; and reasonableness), they are specified as matters to be taken into account in deciding whether the effect has occurred, whereas in section 3A (2) it was expressed to be a requirement of liability that it was reasonable that the conduct should have the effect in question. However, it was not suggested to us that that difference in the structure of the successor provision was intended to make any substantive difference, and I do not believe it does. Nevertheless it means that the precise language of the guidance at para. 13 of my judgment in Dhaliwal needs to be re-visited. I would now formulate it as follows. In order to decide whether any conduct falling within sub-paragraph (1) (a) has either of the proscribed effects under sub-paragraph (1) (b), a tribunal must consider both (by reason of sub-section (4) (a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4) (c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4) (b). The relevance of the subjective question is that if the Claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the Claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."**

26. Mr Pilgerstorfer submits that, notwithstanding what is said in ***Pemberton*** as to there not being any substantive difference between the provisions of s.26, EqA and the predecessor provisions, there is a difference in that it is no longer the case that the question of whether it is reasonable for the conduct to be regarded as having the proscribed effect is the primary and/or determinative question; instead, s.26, EqA requires that each of the three elements set out in s.26(4) – namely perception, circumstances, and reasonableness - must be considered with none of them having

primacy over any other. I shall return to that submission below in dealing with Ground 1 of the Appeal.

The Claimant's Appeal

27. The Claimant lodged a Notice of Appeal on 14 February 2018. The Appeal was rejected on the sift by HHJ Clark. However, the Appeal was permitted to proceed following a Rule 3(10) hearing before HHJ Stacey on the basis of Recast Grounds of Appeal. The Recast Grounds of Appeal contain three grounds. These may be summarised as follows:

    a. Ground 1 – The Tribunal erred in law in that it failed to apply the provisions of s.26(1)(b) and s.26(4), EqA in considering whether there had been harassment. In particular, it is said that the Tribunal erred, in applying as a determinative test, the question of whether it was reasonable for the conduct to be regarded as constituting harassment, instead of recognising that that question was just one of three mandatory factors to be taken into account in deciding whether conduct has the effect set out in s.26(1)(b), EqA.

    b. Ground 2 – The Tribunal erred in relation to the claim of direct discrimination in failing to give effect to its own finding at paragraph 52 of the Judgment that the reason for the Claimant's suspension was his difficulty in handwriting, that being a matter which had been expressly identified by Employment Judge Goodman as a disability upon which the Claimant could rely. The Claimant also contends that the Tribunal erred in failing to consider how the Claimant's comparators and/or a hypothetical comparator would have been treated.

c. Ground 3 – In the event of either of Grounds 1 or 2 succeeding, the Tribunal erred in law in concluding that there had been no breach of the implied term of mutual trust and confidence.

28. I shall deal with each ground in turn.

Ground 1 – Error in applying s.26, EqA

Submissions

29. Mr Pilgerstorfer submits that the Tribunal erred in that it failed to pose and answer the statutory question identified in s.26(1)(b) by not identifying and considering each of the statutory factors referred to in s.26(4). He submits that the Court of Appeal's obiter comments in ***Pemberton v Inwood*** amount to a gloss on the statutory wording, the effect of which is, contrary to what is said by the Court of Appeal in that case, substantively different from predecessor provisions. Underhill LJ said as follows at paragraph 88:

> **"88.The other difference is that, although section 26(2) has the same three elements as section 3A(2) (in short: B's perception; the "circumstances"; and reasonableness), they are specified as matters to be taken into account in deciding whether the effect has occurred, whereas in section 3A(2) it was expressed to be a requirement of liability that it was reasonable that the conduct should have the effect in question. However, it was not suggested to us that that difference in the structure of the successor provision was intended to make any substantive difference, and I do not believe it does . Nevertheless it means that the precise language of the guidance at para 15 of my judgment in the Dhaliwal case needs to be revisited. I would now formulate it as follows. In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances—subsection (4)(b). The relevance of the subjective question is that if the Claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct <u>should not be found</u> to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the Claimant's dignity or creating an adverse environment for him or her, then it <u>should not be found</u> to have done so." (Emphasis added)**

30. Mr Pilgerstorfer contends that the underlined words go too far in that perception and whether it was reasonable for the conduct to have the proscribed effect are merely factors to be taken into account, neither of which is, according to the terms of s.26(4), EqA, to be regarded as determinative. He contrasts the wording of s.26(4), EqA with that of the predecessor provisions, under which conduct would be regarded as having the proscribed effect "only if having regard to all the circumstances, including in particular the perception of that other person, it should reasonably be considered as having that effect".

31. The effect of the new formulation under s.26(4), EqA, contends Mr Pilgerstorfer, is that there may be circumstances where it would be open to the Tribunal to conclude that conduct is to be regarded as having the proscribed effect notwithstanding the fact that it might not be reasonable for it to have that effect. However, instead of taking the correct approach of taking the three mandatory factors into account in deciding whether the impugned conduct had the proscribed effect, the Tribunal applied the old test, that test being merely whether or not it was reasonable to regard the conduct as amounting to harassment.

32. The Tribunal's conclusion that, "In all the circumstances it was not reasonable for Mr Rowland's questioning and manner at the meeting of 7 September to be regarded as constituting harassment, within the meaning of S.26(4)", was wrong for two reasons:

a. First, the reasonableness issue is elevated to being the test for harassment rather than simply a factor to be taken into account under section 26(4); and

b. Second, that it is not the reasonableness of regarding the conduct as constituting "harassment" that is in issue, but whether it is reasonable for the conduct to have the proscribed effect under s.26(1)(b).

33. Mr Pilgerstorfer further contends that the Tribunal failed to consider the relevant circumstances of the case in that it failed to take account of the manner and tone in which Mr Rowland raised his concerns and dismissed potential solutions suggested by the Claimant. Finally, in relation to this meeting, Mr Pilgerstorfer submits that the Tribunal failed to consider the Claimant's perception as to whether the conduct had the proscribed effect, and that merely referring to the Claimant's case in this regard did not suffice.

34. Mr Pilgerstorfer makes similar points in relation to the 8 September 2016 meeting in respect of which it is said that the majority of the Tribunal made the same errors of law as it did with the first meeting in applying s.26(4), EqA; that the majority failed to consider the Claimant's perception as to whether the conduct (i.e. being sent home and told not to work) had the proscribed effect; that the majority failed to consider the other circumstances of the case including remarks made by Mr Rowland to the effect that the Claimant should have considered a different career and that the Respondent did not feel it could have a teacher in the school that cannot write; and that the majority erroneously took account of Mr Rowland's subjective understanding of gardening leave/suspension rather than the objective reasonableness of what the Claimant was actually told.

35. Ms Moss, who appears for the Respondent, submits that the Tribunal did not err in its approach to s.26(4). She submits that it is clear that the Tribunal directed itself properly by setting out statutory test in full and that it clearly had that test in mind in conducting its analysis. The Tribunal considered each of the 3 elements under section 26 (4) in that it had regard to the Claimant's perception, which was, on the Claimant's own evidence, that the conversation was civil; the other circumstances of the case, including Mr Rowland's and Mr Tissot's reasons for the concerns expressed; and whether or not it was reasonable for the conduct to have the proscribed effect. Ms Moss further submits

that on a fair reading of the judgment, there is no indication that the Tribunal wrongly elevated the reasonableness element from being a mere factor to be taken into account to the "essential test" in determining whether or not there was harassment.

Ground 1 - Discussion

36. I begin by considering the Claimant's submission that the Court of Appeal, in its obiter guidance on s.26, EqA in ***Pemberton***, placed a gloss on the statutory wording. In my judgment, that submission cannot be accepted. I say that for the following reasons:

a. First, the Claimant's submission, if correct, would mean that the structure of the successor provisions was intended to make a substantive difference. However, the Court of Appeal, albeit in obiter remarks, expressed a clear view that it was not so intended. Those remarks were not made in passing; they were made in a section of the judgment in ***Pemberton*** where Underhill LJ was expressly considering what changes ought to be made to guidance set out in ***Dhaliwal*** in considering cases of harassment. It is also clear from footnote number 2 to the ***Pemberton*** judgment that Underhill LJ had specifically considered why the change in structure had come about and expressed the view that it was probably "simply a matter of the 2010 Act having its own drafting style". Those remarks ought to be given due weight;

b. Second, I was not taken to any other material, such as Hansard, which might support the contention that the change was intended to introduce a substantive difference. On the Claimant's construction, the objective question, namely whether it is reasonable for the impugned conduct to have the proscribed effect, would no longer be determinative. As such,

harassment could be established where conduct is perceived to have the proscribed effect notwithstanding the fact that it might objectively be considered unreasonable for it to do so. One would expect such a major change to the long-established law of harassment to be the subject of significant debate prior to its introduction;

c. Third, it is notable that whereas s.26(4)(a) and (b) merely identify "the perception of B" and "the other circumstances of the case" as factors to be taken into account, s.26(4)(c) uses the interrogative term, "whether". In other words, the Tribunal was bound to consider *whether* it is reasonable for the impugned conduct to have the proscribed effect, or, as Underhill LJ put it in ***Pemberton***, *whether* it was reasonable for the conduct to be *regarded* as having that effect. This use of the interrogative form tends to suggest that it is only if the question is answered in the affirmative that the claim of harassment could succeed. That analysis is supported by the fact that the question is whether it is reasonable for the conduct to have "*that effect*", that being a reference back to the "effect" referred to in s.26(1)(b). It would be surprising if harassment could be established under s26(1)(b) in circumstances where, objectively, it is not reasonable for the conduct to be regarded as having the effect of violating B's dignity or of creating an adverse environment for B.

d. Fourth, it is difficult to conceive of a situation where conduct could have the proscribed effect even though it was not reasonable for it have that effect. No specific examples were identified by the Claimant. That on its own would not mean that the Claimant's construction is necessarily wrong - statutory provisions are often required to be applied to scenarios not

anticipated at the time of drafting. However, the inability to identify any situation where conduct could have the proscribed effect even though it was not reasonable for it to have that effect does militate against the Claimant's construction being correct.

37. Mr Pilgerstorfer sought to draw support for his construction from para 7.18 of the Code of Practice on Employment 2011. Subparagraph (c) of that paragraph provides:

> **"… Whether it is reasonable for the conduct to have that effect; this is an objective test. The tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended." (Emphasis added)**

38. Mr Pilgerstorfer submits that the use of the word "unlikely" indicates that the Code of Practice contemplates a situation in which unreasonable conduct might still be regarded as having the proscribed effect. However, in my judgment, the Code of Practice does not say that conduct which cannot reasonably be regarded as having the proscribed effect could nonetheless have that effect; the word "unlikely" is used to denote the improbability of the Tribunal concluding that such conduct was reasonable. As such, the Claimant derives no assistance from the Code of Practice.

39. In my judgment, the question of whether or not it is reasonable for the impugned conduct to have the proscribed effect is effectively determinative. In other words, the position is, as stated by Underhill LJ in ***Pemberton***, substantively the same as it was under the predecessor provisions. The approach set out in paragraph 88 of ***Pemberton*** is, in my judgment, the correct approach.

40. Applying that approach, it is clear that the Tribunal did not err in its application of s.26. It considered the Claimant's perception and the other circumstances before considering the reasonableness question. Insofar as the Tribunal treated that last question as effectively determinative, it was not wrong to do so.

41. Mr Pilgerstorfer's further criticism of the Tribunal's conclusion here is that it stated that "it was not reasonable for Mr Rowland's questioning and manner at the meeting of 7 September to be regarded as constituting harassment, within the meaning of section 26 (4) Equality Act 2010". He contends that the underlined words indicate that the Tribunal had failed to apply the correct statutory test which required it to consider whether the impugned conduct had the proscribed effect in s.26(1)(b). In my judgment, the words used by the Tribunal do not indicate that it went astray or that it applied the wrong test. By referring to "harassment within the meaning of s.26(4)", it is tolerably clear that the Tribunal was intending to refer to the effects set out in s.26(1)(b), albeit that it referred to this by way of the shorthand of "harassment". The term "harasses" is defined in s.26(1). By considering whether there was harassment within the meaning of s.26(4) (which provision itself refers back to s.26(1)(b)), it can be inferred that the Tribunal was considering that definition.

42. I turn now to the Claimant's criticisms of the Tribunal's approach to the other two factors under s.26(4), namely perception and the other circumstances. As to the Claimant's perception, the Tribunal clearly did have regard to this at paragraphs 45 and 46 of the judgment. It is true that at paragraph 45, the Tribunal sets out the Claimant's contentions as to Mr Rowland's questioning of him which he regarded as negative, dismissive and hostile and dismissive of all his suggestions. The Tribunal was required to determine whether that claimed perception of Mr Rowland's questioning had substance. At paragraph 46 of the judgment, the Tribunal found that the Claimant had reported the meeting to his own mentors that evening as one where "the conversation was civil of course". In doing so, the Tribunal expressly rejected the Claimant's suggestion that this was only said in order to be diplomatic with his mentors. That was a finding of fact which this Tribunal was entitled to reach, having heard and seen the

witnesses give their evidence. It is not contended that that conclusion was perverse. In my judgment, that finding does deal adequately with the question of perception. It is clear from the Tribunal's finding that it did not accept that this "civil conversation" was as negative, dismissive and hostile as was being suggested.

43. As to the requirement to take account of all the other circumstances, the Tribunal expressly stated that it had done so at paragraph 48 of the Judgment. Of course, a mere assertion that all the circumstances had been taken into account without any factual foundation for making it would not suffice. However, in this case one cannot read paragraph 48 in isolation; it must be read with the other findings of fact made by the Tribunal. As to that, the Tribunal set out (specifically in paragraphs 19 and 20) several matters relevant to the alleged manner and tone of Mr Rowland's questioning. These included the fact that he was shocked to learn that the Claimant was unable to write for more than a minute, the fact that he was sceptical about the Claimant's proposed solutions, and the fact that that scepticism no doubt informed his manner at the meeting. Furthermore, at paragraph 47, the Tribunal took into account other circumstances such as the fact that Mr Rowland was profoundly concerned about whether a new and inexperienced teacher, who was unable to write for more than a minute or two, would be able to assume sole responsibility for nine different classes of 14 to 18 year old pupils, and the fact that he had a responsibility for the education of the pupils and for the welfare of his teachers. Those are all relevant circumstances which cannot be said to have been left out of consideration by this Tribunal. Mr Pilgerstorfer relies upon two specific points noted by the Claimant in his notes of the meeting: these are the comments made by Mr Rowland to the effect that he just could not see someone who cannot write as a teacher and that Dr Lubin does not understand the role of the teacher. It seems to me, however, that those remarks, although not expressly set out in the

judgment, were encompassed within the Tribunal's finding that Mr Rowland was sceptical about the Claimant's solutions and that he could not believe from his experience that a teacher could function in the classroom and in marking people's work without being able to write: see paragraph 46. The Tribunal is not obliged to set out expressly each and every one of the circumstances it has taken into account; depending on the degree of specificity to which one descends, there could be a large number of elements comprising the "other circumstances" of the impugned conduct. The Claimant has not identified any other particular circumstances which were said to be highly material and omitted from the analysis.

44. In my judgment, the Tribunal has dealt with each of the elements of section 26(4) adequately and has come to a conclusion which was open to it to reach on the basis of its findings of fact. I do not consider that any error of law been demonstrated.

45. Similar points may be made in respect of the Claimant's challenge to the Tribunal's findings in respect of the 8 September 2016 meeting. Once again, the Tribunal concluded (in this case by a majority) that "it was not reasonable to regard the Claimant's sending home on suspension as amounting to harassment within the meaning of section 26(4)(c)" (paragraph 50). For the reasons set out above in relation to the earlier meeting, this formulation by the Tribunal of the reasonableness question did not amount to error law.

46. The Claimant also contends that the Tribunal failed to consider his perception as to whether the conduct (that is to say being sent home and told not to work) had the proscribed effect. In my judgment paragraph 50 (iii) of the judgment does indicate that the Tribunal had regard to the Claimant's perception in this regard. There the Tribunal notes that:

> **"(iii) Nevertheless, the Claimant's own notes of the meeting, as set out in paragraph 24 these Reasons, make it clear that the substantive reality of what was being done was explained to him and that he understood it – namely that he was going to be at**

> **home on 'a sort of garden leave' whilst advice was taken and a decision reached about his position at the school – irrespective of the word 'suspension' being used which he was also informed was a 'neutral act'."**

47. As that passage indicates, the Tribunal was assessing the Claimant's perception of the meeting by reference to his contemporaneous notes of that meeting and what these said about his understanding of what he was being told. Mr Pilgerstorfer submits that this is inadequate because this merely records the Claimant's understanding as to what was to happen after the end of the meeting and does not consider his perception of the conduct that he faced at the meeting. I consider that to be a distinction without substance. The notes clearly record the Claimant's understanding of what he was told at the meeting. What he was told might well have been concerned with what was going to happen after the meeting, but it nevertheless is evidence upon which the Tribunal could rely in understanding his perception of what he was being told. At any rate, it does not seem to me to be possible to say that this Tribunal did not take account of the Claimant's perception, which was all that it was required to do under the first limb of section 26(4). One sees, for example, at paragraph 24 that the Tribunal refers to the Claimant's shock at being suspended.

48. Mr Pilgerstorfer also submits that the Tribunal failed to consider the other circumstances of the case. In particular, he submits that Mr Rowland had expressed concluded views adverse to the Claimant remaining at the school, and made unsupportive remarks about the Claimant's career choice and as to the possibility of having a teacher in the school who could not write. Once again, it cannot be said, in my judgment, that the Tribunal failed to take these matters into account. There is, for example, reference in paragraph 24 of the Judgment to the Claimant's disbelief that Mr Rowland had expressed the view that he should not be in a teaching position at all. The Claimant may have perceived that Mr Rowland was expressing concluded views. However, the Tribunal found that the Claimant was asked to stay at home "whilst

advice was taken and a decision reached about his position at the school" (paragraph 50). That finding would appear to indicate that the Tribunal accepted that Mr Rowland's mind was not closed to other solutions.

49. The final point raised by Mr Pilgerstorfer in relation to this issue is that the majority erroneously took account of Mr Rowland's subjective understanding of garden leave/suspension rather than the objective reasonableness of what the Claimant was being told, the latter being the relevant issue for the purposes of s.26(4). This does not seem to me to be a valid criticism of the Tribunal's reasoning. The Tribunal referred to Mr Rowland's understanding of the term 'garden leave', not because it was focusing on his subjective understanding of what it meant, but because Mr Rowland used that term to explain to the Claimant what he was trying to achieve. That is why, it seems to me, the Tribunal refers to the "substantive reality of what was being done was explained to [the Claimant]". Having regard to these matters, the majority of the Tribunal was entitled to reach the conclusion that it was not reasonable to regard the act of sending the Claimant home on suspension as having the proscribed effect.

50. For these reasons, Ground 1 of the appeal is not upheld.

Ground 2 – Direct Disability Discrimination

Submissions

51. The first point made by Mr Pilgerstorfer under this ground is a short one: that is that the Tribunal, having expressly found, at paragraph 52 of the Judgment, that the Claimant was suspended because he was unable to write to due to hand pain, erred in concluding that the reason for suspension had nothing to do with the Claimant's disability. Mr Pilgerstorfer reminds this court that the Tribunal had, at an earlier hearing, concluded that the Claimant was "disabled by reason of difficulty with handwriting, including

hand pain." Given that description of the disability, it was not open to the Tribunal, submits Mr Pilgerstorfer, to find that the suspension was only something arising from disability; the suspension was also *because of* the disability.

52. Miss Moss submits that that is too simplistic an analysis. She submits that the claim was originally put on the basis of the disability of dyspraxia. The Claimant was permitted to amend his claim to rely on "an impairment of difficulty in writing with hand pain" but that that was shorthand for the Claimant being permitted to rely upon an undiagnosed or unknown physical or mental impairment which had a long-term and substantial adverse effect on his ability to carry out the normal day-to-day activity of writing. Ms Moss further submits that the description of the disability in Employment Judge Goodman's judgment is not determinative. That judgment was that the Claimant was disabled "by reason of difficulty with handwriting, including hand pain" (Emphasis added). She submits the underlined words indicate that the disability is not the difficulty with handwriting/hand pain itself, but that the latter was an effect of the (unspecified) disability. Ms Moss further relies upon the practice recommended by the EAT in ***J v DLA Piper*** **[2010] UKEAT 0263_09_1506**, in which Underhill J (as he then was) said as follows:

> **"40. accordingly in our view the correct approach is as follows:**
> **It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it as recommended in *Goodwin v Patent Office* [1999] ICR 302"**
> **however, reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, cases where there may be a dispute about the existence of an impairment it will make sense, for the reason given in paragraph 38 above, to start by making findings about whether the Claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis spread, and to consider the question of impairment in the light of those findings…"**

53. Ms Moss submits that had Employment Judge Goodman adopted that practice, then there would be no question that the reference to difficulties in handwriting and hand

pain in her judgment was a reference to the effect of the impairment and was not intended to denote the impairment itself (whatever that might be).

Ground 2 – Discussion

54. Section 6, EqA defines a disability as follows:

> **6 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.**

55. It is clear from the definition of disability under s. 6(1), EqA, that the Act draws a distinction between the impairment (which can be either physical or mental) and the adverse effect which that impairment has on a person's abilities. (I use 'adverse effect' here as a shorthand for the conditions of substantiality and longevity which an adverse effect must satisfy in relation to the carrying out of normal day-to-day activities). The disability is not defined by reference to the adverse effect alone.

56. Difficulties sometimes arise in separately identifying the impairment and the adverse effect. The adverse effect may be obvious (for example difficulty in walking), but the impairment giving rise to that adverse effect may give rise to difficult questions. This difficulty was considered by Underhill J (as he then was) in ***J v DLA Piper UK Ltd*** **[2010] IRLR 93**:

> **"38… There are indeed sometimes cases where identifying the nature of the impairment from which a Claimant may be suffering involves difficult medical questions; and we agree that in many or most such cases it will be easier – and is entirely legitimate – for the tribunal to park that issue and ask first whether the Claimant's ability to carry out normal day-to-day activities has been adverse the affected – one might indeed say "impaired" – on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common sense inference**

that the Claimant is suffering from a condition which has produced that adverse effect – in other words, and "impairment". If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve difficult medical issues of the kind to which we have referred."

57. In the present case the Claimant had at all times asserted that his disability was dyspraxia. His ET1 states that:

> **"3. The Claimant has various medical conditions including dyspraxia. The Claimant therefore has a disability as defined under the Equality Act 2010"**
> **…**
> **5. Of particular relevance is that in the Claimant's case, dyspraxia manifests itself in (amongst other things), difficulties with reading comprehension speed and handwriting. Although the Claimant can write, he cannot do so continuously for an extended period without suffering from resulting hand pain."**

58. From that it can be seen that the impairment being relied upon is dyspraxia and the adverse effects relied upon are those set out, including difficulty in handwriting and hand pain. It is the combination of both the impairment and the adverse effect that means that the Claimant has a disability for the purposes of EqA. The Claimant does also state at paragraph 54 of his original ET1, as follows:

> **"The Claimant is of the belief that his dyspraxia is a disability as defined by the Equality act 2010. In addition, he believes that the difficulties he has with reading comprehension and handwriting or disabilities in their own right (alternatively, the conditions arising from his learning disability)."**

59. For the purposes of a claim of direct discrimination under section 13, EqA, it must be shown (in accordance with the provisions as to the burden of proof) that there is less favourable treatment of the person with a disability than another who does not have that particular disability. Furthermore, on a comparison for the purposes of a claim under s.13, the circumstances in relation to which there must be no material difference as between the complainant and the comparator include a person's abilities: s.23(1), EqA. In the example of the person who has difficulty walking, the comparator for the purposes of a claim of direct discrimination must, in order to be an appropriate comparator, have that same difficulty.

60. The Code of Practice states as follows:

> **"3.29 … The comparator for direct disability discrimination is the same as for other types of direct discrimination. However, for disability, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person (regardless of whether those abilities or skills arise from the disability itself)."**

61. It can be seen, therefore, that in cases of direct disability discrimination, information as to the abilities of the disabled person will be important, because it is only by having that information that an appropriate comparator, with the same abilities, may be constructed.

62. In my judgment, Employment Judge Goodman's conclusion was not to the effect that the difficulty in handwriting and hand pain constituted a disability within the meaning of s.6, EqA. As set out above, the person who is disabled within the meaning of that section has an impairment (mental or physical) that has an adverse effect on the ability to carry out day-to-day activities. Employment Judge Goodman refers to the Claimant being disabled "by reason of the difficulty with handwriting, including hand pain". That difficulty in handwriting is the adverse effect; it is not a description of the physical or mental impairment having that adverse effect. The physical or mental impairment having that effect is not identified. That is not problematic. As established by Underhill J (as he then was) in ***J v DLA Piper***, in some cases, particularly those where identifying the nature of the impairment from which a Claimant may be suffering involves difficult medical questions, it will suffice to identify whether the Claimant's ability to carry out normal day-to-day activities has been adversely affected on a long-term basis; and it will not always be necessary for Tribunal to resolve difficult medical issues. In the present case, the Claimant himself recognised that there was some difficulty in establishing the precise physiological causation of the difficulties he experiences with handwriting. At paragraph 62 of Employment Judge Tayler's decision at the preliminary hearing, the Judge noted as follows under the heading "disability":

> **"The Claimant seeks to amend the claim form to add, in respect of his contention that he was a disabled person at the material time, that difficulty with handwriting,**

> **including hand pain was a relevant impairment. The Claimant contends this arises from his dyspraxia; but even if it does not he contends that it is not necessary to establish the physiological causation of an impairment."**

63. The Tribunal's conclusion at paragraph 52 of the reasons (in relation to the complaint of discrimination under s.15, EqA) was that the Claimant was suspended "because he was unable to write for more than a minute or two due to hand pain and that this arose from his disability" (Emphasis added). The Tribunal was there drawing a clear distinction between the adverse effect and the disability (or impairment), albeit that it did not specifically identify in this passage whether it was the Claimant's dyspraxia or some other unspecified condition that gave rise to the difficulties with writing. Viewed in these terms, it is clear, in my judgment, that there is no inconsistency between that conclusion and the conclusion in the preceding paragraph, that there were no facts from which the Tribunal "could find, in the absence of an alternative explanation, that the Claimant was suspended or that any proposal to move him from Teach First to the Schools Direct programme was because of his disability, per se." Whereas the conclusion in paragraph 52 was focused on the effects on ability arising from the disability, the conclusion in paragraph 51 was focused on disability. That is the correct approach because in considering a claim of direct disability discrimination the question will be whether the Claimant was treated less favourably because of his disability, and not because of the effect on his abilities. Given that the abilities of the comparator in a claim of direct disability discrimination must not be materially different from those of the Claimant, a finding of less favourable treatment cannot, as a matter of logic, be based on those abilities (or inabilities).

64. Mr Pilgerstorfer's fall back submission under this Ground is that the Tribunal erred in that it reached a conclusion on direct discrimination without engaging at all with the Claimant's case on comparators. He contends that it has been clear throughout that a case on comparators was being run and it behoved the Tribunal to make findings in

respect of those comparators, in particular a Miss Maguire who suffered from RSI and was unable to write for significant periods but was not suspended.

65. Ms Moss does not dispute that the Claimant's case did make reference to comparators. However, she says that there is no material before this Appeal Tribunal that would enable it to assess what evidence as to comparators was placed before the Tribunal and whether there was any failure to consider it.

66. It is notable that whilst the Claimant's original claim and amended claim refer extensively to the claim of direct disability discrimination, neither identifies any comparators. The only reference to the case on comparators in the material before me is contained in the judgment of Employment Judge Tayler where he refers to the fact the Claimant had, in his written submissions for that hearing, referred to Ms Maguire. There is, however, no evidence before me as to the extent to which any reference was made to Ms Maguire at the hearing. It seems to me that where a ground of appeal is predicated on the failure to have regard to evidence adduced in respect of a particular issue, it is necessary for the appellant to follow the procedure set out in the standard order for a full hearing for the EAT. This provides that if a party considers that any matters of or relating to evidence adduced below (which do not already sufficiently appear from the decision of the Employment Tribunal) are reasonably required for the purposes of the appeal that party shall seek to produce an agreed note of the evidence in that regard, and in the absence of such agreement, apply to the EAT for an order requiring the employment tribunal to provide answers to a questionnaire in relation to such evidence. That procedure was not followed in this case. It is, therefore, very difficult to say that there was evidence before the Tribunal to which it has not made any reference in its judgment. The limited information that is available about Ms Maguire tells one very little as to whether or not she would be a suitable comparator. The only information as

to her abilities is that set out in employment Judge Tayler's decision, which says that as a result of RSI she was, according to the Claimant, not able to write for significant periods. It is far from clear from that description whether those periods were intermittent, how long they lasted or whether they resulted in an almost complete inability to write as in the Claimant's case. It certainly cannot be inferred from this limited information that Ms Maguire would have been an appropriate comparator for the purposes of a section 13 claim.

67. In any event, as is common ground in this case, it is no error of law not to identify a comparator. That is particularly so where the reason for the treatment is clear: see ***Shamoon v Chief Constable of Royal Ulster Constabulary*** **[2003] IRLR 285** at [10] to [12]. In this case, it seems to me that the reason for the treatment is clear, namely the difficulty which the Claimant had with handwriting. This was a case where Mr Rowland has expressed shock in learning of a teacher who could not write and stated that this was something he had never come across before. That in itself would imply that, insofar as Ms Maguire was under Mr Rowland's management, her situation was not similar to that of the Claimant. It can also be inferred from the trenchant nature of the views expressed by Mr Rowland, and as recorded by the Tribunal, that he would have treated any person with a similar limitation on the ability to write in the same way. There was no evidence in this case to suggest that the Respondent and/or any of its managers had a particular antipathy towards persons with dyspraxia or similar conditions that could give rise to any inference of discriminatory motive (whether conscious or otherwise).

68. Ground 2 is therefore not upheld.

69. Given that neither ground of appeal has been upheld it is not necessary, as both Counsel acknowledged at the outset, to deal with ground 3 of the appeal as that cannot stand on its own.

Conclusion

70. For all of these reasons, and notwithstanding Mr Pilgerstorfer's powerful submissions, this appeal must be dismissed.